Supreme Court, U.S.
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No. ___

IN THE
Supreme Court of the United States

DENNIS HECKER, JONNA DUANE, AND JANICE RIGGINS,
Petitioners,

v

DEERE & COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 14, 2009

QUESTIONS PRESENTED

Congress passed the Employee Retirement Income Security Act of 1974 ("ERISA") to create "judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds" *Massachusetts Mut Life Ins Co. v Russell*, 473 U.S 134, 140 n 8 (1985) (internal quotations omitted). Section 404(a) of ERISA requires pension plan fiduciaries to act solely for the benefit of plan participants and to use the care that "a prudent man acting in a like capacity and familiar with such matters would use" 29 U S C § 1104(a)(1) Section 404(c) creates a limited exemption from liability for plan losses that are not caused by the fiduciary's breach of duty but instead "result[] from [the] participant's exercise of control" over plan assets. *Id* § 1104(c)(1)(A)(ii)

The questions presented are:

1 Whether the court below erroneously held – despite a contrary decision of the Fourth Circuit and the authoritative interpretation of the Department of Labor ("DOL") – that a plan fiduciary's imprudent selection of investment options with excessive fees is exempt from liability under § 404(c) of ERISA, as long as plan participants can choose from a sufficiently broad range of investment options

2 Whether the court below erred in holding – contrary to numerous other circuit decisions and the considered views of DOL – that petitioners' allegations that a plan fiduciary selected retail mutual funds with excessive fees, without adequate investigation and without any effort to explore readily available, lower-cost options, failed to state a claim under § 404(a) of ERISA.

LIST OF PARTIES TO THE PROCEEDING

Petitioners Dennis Hecker, Jonna Duane, and Janice Riggins were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings

Respondent Deere & Company was a defendant in the district court proceedings and an appellee in the court of appeals proceedings.

Fidelity Management Trust Company and Fidelity Management & Research Company were defendants in the district court proceedings and appellees in the court of appeals proceedings, but, pursuant to this Court's Rule 12 6, are not parties in this Court because petitioners do not seek review of the portion of the decision below affirming the district court's dismissal of their claims against those defendants

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Dennis Hecker, Jonna Duane, and Janice Riggins respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case

INTRODUCTION

This case presents an exceptionally important issue of federal pension law that has divided the lower courts American employees hold more than $5 2 trillion in assets in pension plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), accounting for nearly 13% of all household financial assets in the United States. *See* Investment Company Institute, *The U S Retirement Market, First Quarter 2009*, at 1-3 (Aug 2009), *available at* http //www ici org/pdf/09_q1_retmrkt_update pdf (hereinafter "*U S Retirement Market*") Pension plan participants do not have free rein to invest the retirement assets in those pension plans Rather, participants' choices are limited to a range of investment options selected by the plan's administrator. The value of a participant's retirement assets upon redemption is a function not only of the performance of the chosen investment, but also, critically, of the fees and expenses incurred

To protect the value of the assets of American employees' pension plans, ERISA imposes strict fiduciary duties on plan administrators Plan administrators must act "solely in the interest" of the plan's beneficiaries, and they must use "the care, skill, prudence, and diligence . that a prudent man acting in a like capacity and familiar with such matters would use." 29 U S C § 1104(a)(1)(B) Accordingly, when selecting investment options for the plan, plan administrators must not only avoid self-dealing, but also "employ[] the appropriate methods to investigate

the merits of the investment and to structure the investment." *Flanigan v. General Elec. Co.*, 242 F.3d 78, 86 (2d Cir. 2001) (internal quotations omitted).

In the decision below, the Seventh Circuit created an enormous and unjustified loophole in ERISA's fiduciary protections. Petitioners' complaint alleged that respondent Deere, the administrator of two ERISA-governed plans in which petitioners participate, imprudently limited participants' investment options to retail mutual funds offered by affiliates of Fidelity Investments ("Fidelity"), without any investigation into whether those mutual funds' fees (ranging from 0.07% for index funds to over 1% for actively managed funds) were reasonable for a plan of Deere's size ($2.5 billion) and without any effort to explore other readily available and less costly investment alternatives. By contrast to the mutual fund fees charged by Fidelity, the largest money managers charge pension funds, on average, fees of only 0.08%. Thus, Deere caused the plans, in some instances, to pay more than 10-fold what comparable pension funds pay, and participants incurred significant losses that Deere readily could have avoided.

The Seventh Circuit dismissed the complaint with prejudice, holding that defendants were immunized from liability by § 404(c) of ERISA and, in the alternative, that petitioners' allegations failed to state a claim under § 404(a) of ERISA. Both holdings warrant this Court's review. As the Seventh Circuit itself recognized, *see* Pet. App. 26a, its expansive interpretation of § 404(c)'s exemption from liability conflicts not only with the Department of Labor's ("DOL") longstanding interpretation of § 404(c) and its implementing regulations, but also with a decision of the Fourth Circuit. *See infra* pp. 14-18.

Moreover, the Seventh Circuit's alternative holding under § 404(a) ignores decades of precedent from other circuits, as well as DOL's consistent and carefully considered views *See infra* pp. 22-28

The proper scope of ERISA's fiduciary duty to select prudent investments is critically important to tens of millions of American employees whose retirement savings are invested through ERISA-governed pension plans Each year, American employees lose hundreds of millions of dollars due to imprudent selection of investment options with unnecessary fees This Court should grant review and reverse the Seventh Circuit's unwarranted exemption from fiduciary liability for such imprudent investment selection.

OPINIONS BELOW

The opinion of the court of appeals (Pet App 1a-31a) is reported at 556 F 3d 575 That opinion was supplemented as part of the order denying rehearing (Pet App. 50a-54a), which is reported at 569 F.3d 708 The opinion of the district court (Pet App 32a-48a) is reported at 496 F Supp 2d 967

JURISDICTION

The court of appeals entered its judgment on February 12, 2009 A petition for rehearing was denied on June 24, 2009 *See* Pet. App. 49a-54a On September 14, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 14, 2009. *See id* at 84a. The jurisdiction of this Court is invoked under 28 U S.C § 1254(1)

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 404 of ERISA, 29 U.S C § 1104, and 29 C F R § 2550.404c-1 are set forth at Pet App 55a-83a.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Congress, aware of the critical importance of retirement plans to the American economy and American workers, passed ERISA to "assur[e] the equitable character of [employee benefit plans] and their financial soundness." *Central States, Southeast & Southwest Areas Pension Fund v Central Transp., Inc.*, 472 U S. 559, 570 (1985). "The floor debate reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators " *Massachusetts Mut Life Ins. Co. v Russell*, 473 U S. 134, 140 n.8 (1985) To address that concern, ERISA requires that employee benefit plans "provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan " 29 U S.C § 1102(a)(1) Among the central responsibilities of plan fiduciaries is the duty to select appropriate investment options for the plan

ERISA's statutory provisions "abound[] with the language and terminology of trust law " *Firestone Tire & Rubber Co v. Bruch*, 489 U.S 101, 110 (1989) Rather than enumerate all applicable requirements, ERISA imposes general fiduciary duties of loyalty and prudence, which are the "highest known to the law," *Donovan v Bierwirth*, 680 F 2d 263, 272 n 8 (2d Cir. 1982), and directs federal courts to apply them in specific cases. *See* 29 U S.C § 1104(a)(1) (duty to act "solely in the interest of the participants and be-

neficiaries"); *id* § 1104(a)(1)(B) (duty to act with "the care, skill, prudence, and diligence that a prudent man acting in a like capacity and familiar with such matters would use") Plan participants are empowered to enforce these duties through private civil actions for damages or equitable relief *See id* §§ 1109(a), 1132(a)

ERISA also establishes a limited "safe harbor" from civil liability for fiduciary breach in certain circumstances where the "pension plan provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account" *Id* § 1104(c)(1)(A). For the safe harbor to apply, a plan must meet the standards promulgated by the Secretary of Labor ("Secretary") for an "ERISA section 404(c) plan" by, among other things, giving a participant "independent control in fact with respect to the investment of assets in his individual account" 29 C F.R § 2550.404c-1(c) Even when those prerequisites are satisfied, ERISA makes clear that fiduciaries are protected from liability only for a "loss . which results from such participant's or beneficiary's exercise of control." 29 U S C § 1104(c)(1)(A)(ii) As described more fully below, pursuant to expressly delegated authority, the Secretary has consistently interpreted § 404(c) and her own implementing regulation, 29 C F.R § 2550 404c-1, to mean that fiduciaries are not immunized from liability for losses attributable to a plan fiduciary's improper selection of investment options, because such losses are not the "direct and necessary result of that participant's or beneficiary's exercise of control." *Id* § 2550 404c-1(d)(2); *see infra* pp 18-22

B. Factual Background

Petitioners are participants in two tax-qualified defined-contribution pension plans, popularly known as "401(k)" plans, established by Deere, a manufacturer of heavy equipment for use in agriculture, construction, forestry, and landscaping, with more than 47,000 employees in 26 countries worldwide. The two plans – called the Savings & Investment Plan and the Tax Deferred Savings Plan – operate in substantially the same fashion· qualified Deere employees are permitted to contribute a certain amount of their pre-tax earnings into an individual plan account, and Deere matches those contributions in varying percentages up to 6%. Deere may also make profit-sharing contributions to the Savings & Investment Plan As of the end of 2005, the two Deere plans held more than $2 5 billion in contributed assets

Because ERISA requires that pension plan assets be held in trust, *see* 29 U S C. § 1103(a), Deere, as the plans' sponsor and administrator, *see id* § 1002(16), entered into a written trust agreement in 1991 with Fidelity Management Trust Company ("Fidelity Trust"), a subsidiary of Fidelity Investments, to provide administrative and recordkeeping services as the plans' trustee. That agreement also provided that Deere's selection of mutual funds for the plans would be limited to funds offered by another Fidelity affiliate, Fidelity Management & Research Company ("Fidelity Research") Fidelity Research is a registered investment company that acts as the investment advisor to the Fidelity family of mutual funds It is compensated for those services through fees – calculated as a percentage of assets and

expressed as an "expense ratio" – that it charges to each of the Fidelity funds that it advises.

At the time of petitioners' Second Amended Complaint ("Amended Complaint"), participating employees could invest plan contributions in 26 primary investment options Of those 26 options, 23 were retail Fidelity mutual funds – the same mutual funds that Fidelity makes available to any investor in the general public, large or small The three remaining options consisted of two Fidelity pooled funds – investment vehicles similar to mutual funds – managed directly by Fidelity Trust, and an investment fund that held exclusively Deere common stock Participants also had access to BrokerageLink, a service by which Fidelity enables participants, for a fee, to invest in a large number of additional retail mutual funds offered by Fidelity as well as other mutual fund companies. All of the mutual fund options Deere made available to plan participants were retail mutual funds, which, as discussed further below, charge significantly higher fees than other investment options readily available to large institutional investors such as the Deere plans

C. Proceedings Below

1. On December 8, 2006, petitioners filed a complaint against Deere and Fidelity in the United States District Court for the Western District of Wisconsin. The crux of petitioners' complaint against Deere, as amended, was that Deere failed to conduct a prudent investigation of the retail Fidelity mutual funds and their associated fees, and made no effort to use the plans' large size (more than $2 5 billion in assets) to obtain better than retail-level fees from

Fidelity or another investment manager [1] As a result of this imprudence, the plans and their participants paid unnecessary and excessive fees to Fidelity, and suffered significant economic losses. *See* Am Compl ¶¶ 36, 44, 76, 105 The complaint further alleged that, under an undisclosed arrangement by which Fidelity Research shared certain revenue with Fidelity Trust, Deere caused plan participants to incur these excessive fees as a means of covering payments that Deere otherwise would have paid to Fidelity Trust for its administrative services, in violation of Deere's duties of candor and loyalty *See id* ¶¶ 88-90, 125; *see also* Pet App 17a-18a (finding that Deere "creat[ed] the impression that it was generously subsidizing its employees' investments by paying something to Fidelity Trust when it was doing no such thing").[2]

In March 2007, Deere filed a motion to dismiss the Amended Complaint. According to Deere, petitioners' claim that Deere breached its fiduciary duties by imprudently selecting unduly expensive investment options – specifically, retail mutual funds with unne-

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[1] Petitioners alleged that Fidelity was liable for breach of fiduciary duty because it was involved with Deere in the selection of investment options for the plans The district court dismissed the claims against Fidelity on the ground that the trust agreement gave Deere "sole responsibility for selection of plan investment options" Pet App 47a The court of appeals affirmed Although petitioners believe that ruling is erroneous because fiduciary status under ERISA turns on how an entity functions, not what the documents recite, they acknowledge that the issue is fact-bound and thus do not challenge it here

[2] The complaint also alleged that Deere's failure to disclose the revenue-sharing arrangement constituted an independent violation of Deere's fiduciary duties under ERISA Both the district court and the court of appeals disagreed and dismissed that aspect of the complaint

cessarily high fees – was barred by the "safe harbor" under § 404(c) of ERISA

2. The district court dismissed the complaint in its entirety, with prejudice With respect to petitioners' claim of imprudent investment selection, the court acknowledged that Deere "could have negotiated lower fees with Fidelity Research, or could have selected different funds from different providers with lower rates." Pet App 35a. The court also recognized that Deere "made no effort" to obtain lower prices for the plans' beneficiaries *Id.* Notwithstanding Deere's acknowledged failure to take any steps to reduce beneficiaries' costs, the court held that Deere was immune from liability under § 404(c) of ERISA because, "to the extent participants incurred excessive expenses, those losses were the result of participants exercising control over their investments." *Id* at 46a-47a The court reasoned that participants had access to a wide range of retail mutual funds that "were also offered to investors in the general public" and that it was "untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios" *Id* at 46a In addition to dismissing petitioners' complaint, the court assessed more than $200,000 in costs on petitioners

3. On appeal, the Secretary of Labor (then Elaine L Chao) filed a brief as *amicus curiae* in support of petitioners, arguing that the district court had erred in construing the § 404(c) safe harbor to immunize plan fiduciaries from liability for imprudent selection of investment options ("DOL Initial Brief") The Secretary noted that the preamble to DOL's 1992 regulations implementing § 404(c) provided that "the act of designating investment alternatives . in an

ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable." 57 Fed Reg 46,906, 46,922 (Oct 13, 1992) The selection of investment options does not fall under the plain terms of § 404(c) or the Secretary's implementing regulations because "the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan . . . is not a direct or necessary result of any participant direction of such plan" *Id.* at 46,924 n 27. The Secretary's *amicus* brief contended that her interpretation was entitled to *Chevron*[3] deference because it had been issued after notice-and-comment rulemaking pursuant to an express delegation of authority by Congress, and had been consistently adhered to by DOL. *See* DOL Initial Br. 15-17

Despite the Secretary's contentions, the Seventh Circuit affirmed First, the court held that petitioners' allegations "that Deere violated its fiduciary duty by selecting investment options with excessive fees" failed to state a claim for breach of fiduciary duty under ERISA because "the undisputed facts leave no room for doubt that the Deere Plans offered a sufficient mix of investments for their participants" Pet. App. 19a The Seventh Circuit, like the district court, relied on the fact that "there was a wide range of expense ratios" (0.07% to just over 1%) among the retail mutual funds available to plan participants *Id* Moreover, "all of these funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition." *Id.* According to the court,

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[3] *Chevron U S A Inc v Natural Res Def Council, Inc*, 467 U S 837 (1984)

that combination of pled facts – the supposedly broad range of retail funds offered by Deere with a supposedly wide range of fees set against the backdrop of market competition – was sufficient to defeat petitioners' claim of imprudent selection of investment options at the pleading stage Like the district court, the Seventh Circuit acknowledged that Deere could have obtained lower fees through other investment vehicles, such as institutional funds, but it dismissed that fact as "beside the point" for purposes of dismissal of petitioners' complaint, because "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund " *Id* at 19a-20a

Moreover, the Seventh Circuit held that, "[e]ven if [it had] underestimated the fiduciary duties that Deere had to its plan participants," Deere was exempt from liability under § 404(c) *Id.* at 21a Although the court declined to decide whether § 404(c) "always shield[s] a fiduciary from an imprudent selection of funds under every circumstance that can be imagined," it ruled in the decision below that § 404(c) does protect a fiduciary as long as it "includes a sufficient range of options so that the participants have control over the risk of loss " *Id.* at 26a According to the court, as long as there is a sufficiently "broad range of investment alternatives" with a variety of fees to allow plan participants to diversify and manage their exposure to fees, any investment loss caused by excessive fees is attributable to the participants' own investment choices *Id* at 26a-27a The court relied on the Fifth Circuit's decision in *Langbecker v Electronic Data Systems Corp* , 476 F.3d 299, 310-11 (5th Cir 2007), but it also recognized that its holding was at odds with the Fourth Circuit's contrary decision in *DiFelice v U S*

Airways, Inc., 497 F.3d 410, 418 n.3 (4th Cir. 2007). *See* Pet. App. 26a.

4. On petition for rehearing, the Secretary (now Hilda L. Solis) once again filed an *amicus* brief in support of petitioners. As in DOL's initial *amicus* brief, the Secretary again objected to the Seventh Circuit's refusal to give *Chevron* deference to "the Secretary's interpretation of [ERISA] and her 404(c) regulation" and expressed disagreement with the panel's holding that an imprudent selection of investment options is insulated from liability as long as the fiduciary provides a sufficiently broad range of investment choices. DOL Rehearing Br. 1-2. The Secretary also criticized as "mistaken" the Seventh Circuit's "conclusion that the fees [incurred by the plans] were necessarily prudent because the Plans' array of investment funds w[as] offered 'to the general public' at the same expense ratios that the Plans paid." *Id.* at 9-10. The Secretary noted that petitioners' core "assertion that the fiduciaries could and should have considered fees and favorable pricing arrangements finds some support in the Secretary's previous pronouncements," *id.* at 11 n.1, and she took issue with the Seventh Circuit's disposition of the case on the pleadings, "without full consideration of any evidence that might be developed and introduced," *id.* at 13. The Secretary urged the panel to reconsider its decision in light of the "far-reaching ramifications" of its holding, which would "permit[] fiduciaries to evade accountability for the imprudent selection and maintenance of funds in defined contribution plans" nationwide. *Id.* at 2.

The Seventh Circuit denied rehearing and rehearing *en banc*. In its order denying rehearing, the panel supplemented its original opinion in response to

the Secretary's *amicus* brief First, the panel refused to give *Chevron* deference to the Secretary's interpretation of § 404(c) and her own implementing regulations, on the ground that it was not contained "in the regulation proper," but only in a preamble to the regulation Pet App 50a. The panel then dismissed the Secretary's concerns about the ramifications of its decision as "more hypothetical than real" *Id* at 52a The panel claimed that its decision was "limited to the complaint before the court." and it denied that it would give a "green light" to "reckless" inclusion of "unsound" investment alternatives based on "the simple expedient of including a very large number of investment alternatives" in the portfolio. *Id* at 52a-53a However, the panel did not explicitly repudiate its holding that § 404(c) shields a fiduciary as long as it "includes a sufficient range of options so that the participants have control over the risk of loss" *Id* at 26a. Instead, the panel continued to rest its affirmance of the district court's dismissal on the fact that the particular package of mutual funds offered by the Deere plans gave participants thousands of investment options with significant "variation in associated fees." *Id.* at 54a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's interpretations of § 404(c) and § 404(a) of ERISA warrant this Court's review because they are at odds with the decisions of other federal courts of appeals and the position of DOL, and they undermine critical congressional policies under ERISA. The Seventh Circuit's refusal to apply DOL's longstanding interpretation that § 404(c) does not immunize a plan fiduciary from liability for improper selection of investment options runs contrary to a decision of the Fourth Circuit Likewise, the Seventh Circuit's view that a claim for imprudent investment selection can be foreclosed by the availability of a broad range of retail mutual fund options with market-based fees is at odds with both DOL policy and longstanding case law from other circuits.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DIVISION AMONG THE LOWER COURTS ON THE PROPER INTERPRETATION OF § 404(c) OF ERISA

A. The Seventh Circuit's Refusal To Defer To DOL's Construction Of § 404(c) Deepens The Division Among The Courts Of Appeals

The question whether § 404(c) immunizes a plan fiduciary from liability arising from the fiduciary's selection of investment options has divided both the federal courts of appeals and the federal district courts The Secretary's interpretation of § 404(c) since 1992 has provided that liability for losses due to a fiduciary's selection of improper investment alternatives is not foreclosed by § 404(c) because such losses do not "result[] from" the participant's "exercise of control" over the assets in his account 29 U.S.C § 1104(c)(1)(a)(A)(ii). The Seventh Circuit

rejected that longstanding interpretation and held that fiduciaries are immunized from liability for any such losses under § 404(c) as long as they "include[] a sufficient range of options so that the participants have control over the risk of loss." Pet. App. 26a.

As the Seventh Circuit recognized, that holding deepened a preexisting disagreement between the Fourth and Fifth Circuits. In *Langbecker*, a divided panel of the Fifth Circuit also rejected the Secretary's interpretation of § 404(c) and her own implementing regulation. The majority in *Langbecker* recognized that there is "much disagreement" about whether the Secretary's interpretation is entitled to deference. 476 F.3d at 310 n.22. Without resolving that question, the majority held that, even assuming that *Chevron* deference applied, the Secretary's interpretation was unreasonable. In the majority's view, the Secretary's "contradict[ed] the governing statutory language" because it would "render the § 404(c) defense applicable only where plan managers breached no fiduciary duty" and thus "eliminate [the] § 404(c) defense altogether." *Id.* at 311. The majority held, instead, that whether § 404(c) bars a claim of improper investment selection must be analyzed on a "transactional, case-by-case" basis. *Id.*

Judge Reavley, in dissent, criticized the majority for "misappl[ying]" § 404(c). *Id.* at 319. He would have held that "imprudent designation of an option for participants to choose constitutes grounds for fiduciary liability, and falls outside the scope of participant control envisaged by § 404(c)." *Id.* Judge Reavley concluded that the Secretary's interpretation was entitled to *Chevron* deference under this Court's decisions because it had been promulgated as part of a final rule after formal notice-and-comment processes.

under the Administrative Procedure Act ("APA") and because it had been "uniformly adhered to" by DOL *See id* at 320, *see also infra* pp 18-22 Judge Reavley also concluded that the Secretary's interpretation was reasonable because, "[i]f no duty of prudence attaches to selection of investment options, plan fiduciaries could imprudently select a full menu of unsound investments, among which participants would be free to choose at their peril, while the fiduciaries remain insulated from responsibility." 476 F.3d at 321-22

In contrast with the decision below and the Fifth Circuit's decision in *Langbecker*, the Fourth Circuit in *DiFelice* expressly adopted the Secretary's interpretation and ruled that the § 404(c) "safe harbor provision does not apply to a fiduciary's decisions to select and maintain certain investment options within a participant-driven 401(k) plan." 497 F 3d at 418 n 3 Citing Judge Reavley's dissent in *Langbecker*, the Fourth Circuit stated that, "although section 404(c) does limit a fiduciary's liability for losses that occur when participants make poor choices from a satisfactory menu of options, it does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance" *Id.* Had petitioners' complaint been brought in the Fourth Circuit, § 404(c) would have offered defendants no immunity from liability. Indeed, the *Hecker* panel expressly acknowledged that *DiFelice* is squarely at odds with *Langbecker* and the decision below Pet App. 26a

The division among the Fourth, Fifth, and Seventh Circuits has spawned inconsistent decisions in the federal district courts *See, e g., In re Washington Mut., Inc Sec , Derivative & ERISA Litig* , No 2.08-md-1919 MJP, 2009 WL 3246994, at *7 (W.D Wash

Oct 5, 2009) (recognizing disagreement between *Hecker* and *DiFelice*), *Page v Impac Mortgage Holdings, Inc*, No. SACV 07-1447 AG (MGLx), 2009 WL 890722, at *4 (C D Cal Mar 31, 2009) (noting the "directly conflicting circuit court cases on this issue") On one hand, virtually all of the district court decisions outside of the Fifth and Seventh Circuits have sided with DOL, *DiFelice*, and Judge Reavley's dissenting opinion in *Langbecker*, and have held that the § 404(c) "safe harbor" does not foreclose claims alleging improper selection of investment alternatives for an ERISA-governed pension plan [4] In the Seventh Circuit, however, district courts are now bound by the contrary decision below *See Lingis v Motorola, Inc.*, No. 03 C 5044, 2009 WL 1708097, at *13 (N.D Ill June 17, 2009) (following *Hecker* but recognizing the inconsistent holdings of *Tyco* and *Page*); *Abbott v. Lockheed Martin Corp.*, No 06-cv-

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[4] *See Tibble v Edison Int'l*, No CV 07-5359 SVW (AGRx), 2009 WL 2382340, at *41-*42 (C D Cal July 16, 2009) (disagreeing with *Hecker* and "find[ing] that the § 1104(c) safe harbor does not apply" to "claims of imprudent or disloyal selection of investment options"), *clarified on other grounds*, 2009 WL 2382348 (C D Cal July 31, 2009), *Page*, 2009 WL 890722, at *4 (adopting *DiFelice*, Judge Reavley's dissent in *Langbecker*, and DOL's interpretation), *In re Tyco Int'l, Ltd Multidistrict Litig*, 606 F Supp 2d 166, 169 (D N H 2009) (agreeing with Judge Reavley's dissent in *Langbecker* that "DOL's interpretation of its own regulations is reasonable and should not be ignored"), *Kanawi v Bechtel Corp*, 590 F Supp 2d 1213, 1232 (N D Cal 2008) (Breyer, J) (adopting DOL's interpretation), *Tatum v R J Reynolds Tobacco Co*, 254 F R D 59, 65-66 (M D N C 2008) (following *DiFelice*), *see also Spano v Boeing Co*, No 06-cv-743-DRH, 2007 WL 2688456, at *1 (S D Ill Sept 10, 2007) (noting that "[t]he majority of courts to have interpreted ERISA § 404(c) have adopted the DOL's position") (citation omitted), *Langbecker*, 476 F 3d at 322 n 5 (Reavley, J , dissenting) (citing additional cases)

0701-MJR, 2009 WL 839099, at *6 (S.D Ill Mar 31, 2009) (dismissing complaint based on *Hecker*); *cf. Boeckman v A.G Edwards, Inc.*, Civil No 05-658-GPM, 2007 WL 4225740, at *6 (S D Ill Aug 31, 2007) (pre-*Hecker* decision expressing doubt about *Langbecker*) Likewise, in the Fifth Circuit, district courts that had previously adhered to DOL's position are now bound by *Langbecker*'s ill-defined "transactional, case-by-case" approach to the § 404(c) safe harbor *Cf In re Enron Corp Sec., Derivative & ERISA Litig.*, 284 F. Supp 2d 511, 578-79 (S D Tex 2003) (adopting DOL's interpretation), *In re Dynegy, Inc ERISA Litig*, 309 F Supp. 2d 861, 893-94 & n 57 (S D Tex 2004) (same) The Court should grant certiorari to resolve the clear disagreement among the lower courts

B. The Seventh Circuit's Rejection Of DOL's Construction Of § 404(c) Is At Odds With This Court's Precedents And Should Be Reversed

The Seventh Circuit's decision is wrong and should be reversed It is well settled under this Court's administrative law precedents that a federal agency's interpretation of a federal statute or its own regulation, rendered pursuant to delegated authority and notice-and-comment rulemaking, must be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute" *Chevron*, 467 U.S at 844; *see, e g*, *United States v Mead Corp*, 533 U S 218, 230 & n.12 (2001) (collecting cases) Here, not only did Congress generally delegate authority to the Secretary to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of" Title I of ERISA, 29 U.S C § 1135, but it also specifically instructed the Secre-

tary to prescribe regulations to determine when the conditions set forth in § 404(c) are satisfied Because Congress recognized that "there may be difficulties in determining whether [a] participant in fact exercises independent control over his account," it vested the Secretary with the power to make the necessary policy judgments regarding the scope and application of § 404(c) H R Conf Rep No 93-1280, at 305 (1974), *reprinted in* 1974 U.S.C.C A N 5038, 5086 ("[W]hether participants and beneficiaries exercise independent control is to be determined pursuant to regulations prescribed by the Secretary of Labor.")

Pursuant to that express delegation of authority, the Secretary issued a notice of proposed rulemaking ("NPRM") in 1991. *See* 56 Fed Reg 10,724 (Mar 13, 1991). The Secretary's proposed regulation provided that, "[i]f a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in paragraph (d) of this section, then no other person who is a fiduciary with respect to such plan shall be liable to such participant or beneficiary for any loss, or with respect to any breach of part 4 of Title I of the Act, that is the direct and necessary result of that participant's or beneficiary's exercise of control" *Id* at 10,737-38 (proposed 29 C.F.R. § 2550.404c-1(e)(2)) The Secretary made clear in the NPRM, moreover, that proposed § 2550 404c-1 would not foreclose liability for improper selection of investment options, because "the act of limiting or designating investment options which are intended to constitute the investment universe of an ERISA 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or express plan language, is not a direct or necessary result of

any participant direction of such plan" *Id* at 10,732 n.21.

Numerous commentators addressed the Secretary's proposed regulations, including comments directed at the issue of fiduciary duties in investment selection. *See* 57 Fed Reg at 46,922-23, 46,925. Ultimately, the Secretary adhered to the proposed regulation's "direct and necessary result" requirement *See id* at 46,935 (promulgating 29 C F.R. § 2550.404c-1(d)(2)). Moreover, "[a]fter carefully reviewing the public comment on this matter," the Secretary twice emphasized in the preamble to the final regulation that, under the final rule, "the act of designating investment alternatives . in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable." *Id.* at 46,922, *see id* at 46,924 n.27 ("[T]he Department points out that the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which . is not a direct or necessary result of any participant direction of such plan") This part of DOL's preamble was thus an integral part of the agency's final rule, which was promulgated pursuant to full notice-and-comment procedures under the APA

The Seventh Circuit's sole reason for refusing to give *Chevron* deference to the Secretary's preamble was that it was not codified "in the regulation proper" Pet. App 50a. That rationale puts form over substance and runs flatly contrary to this Court's precedents Indeed, many binding agency regulations are promulgated through formal orders, but not codified, and that distinction has never been material to the applicability of *Chevron* deference *See, e.g.*,

National Cable & Telecomms Ass'n v Brand X Internet Servs, 545 U S 967, 980 (2005) (applying *Chevron* to Federal Communications Com-mission declaratory ruling) Rather, the question of formality turns on the extent to which the agency's interpretation was "subject to the rigors of the [APA], including public notice and comment" *Mead*, 533 U S at 228 & n.9 (internal quotations omitted, brackets in original) Here, the preamble to the Secretary's 1992 regulations is entitled to *Chevron* deference because it went through the full rigors of notice-and-comment rulemaking

Moreover, even putting aside the regulatory preamble, "an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted" *Long Island Care at Home, Ltd. v Coke*, 551 U S 158, 171 (2007) (internal quotations omitted) Since 1992, in opinion letters[5] and numerous *amicus* briefs[6] under three successive presidential administrations, DOL has consistently construed the "direct and necessary result" requirement in its own regula-

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[5] *See* DOL Opinion Letter No 98-04A, 1998 WL 326300, at *3 n 1 (May 28, 1998), DOL Information Letter, 1997 WL 1824017, at *2 (Nov 26, 1997)

[6] *See* DOL Rehearing Br 7, DOL Initial Br 12-16, Br of Sec'y of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees 22-23, *Lively v Dynegy Inc*, No 07-2073 (7th Cir filed Oct 10, 2007), *available at* http //www dol gov/sol/media/briefs/lively (A)-10-10-2007 pdf, Br of Sec'y of Labor as *Amicus Curiae* Supporting Plaintiffs-Appellants 17 n 7, *In re Schering-Plough Corp ERISA Litig*, No 04-3073 (3d Cir filed Oct 21, 2004), *available at* 2004 WL 5215266, Br of Sec'y of Labor as *Amicus Curiae* Opposing Motions To Dismiss 37, *Tittle v Enron Corp*, Civ Action No H-01-3913 (S D Tex filed Aug 30, 2002), *available at* 2002 WL 32913113

tions, 29 C F.R § 2550.404c-1, to mean that liability for improper investment selection is not foreclosed by the § 404(c) safe harbor *Cf. Coke*, 551 U.S at 170-71 (upholding DOL regulation under *Chevron* even though it had changed over time) These definitive agency pronouncements are themselves entitled to deference because they "reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *see also Fidelity Fed Sav & Loan Ass'n v Cuesta*, 458 U S. 141, 158 & n 13 (1982) (preamble to Federal Home Loan Bank Board regulation constituted "administrative construction of the [Board's] regulation, to which deference is clearly in order") (internal quotations omitted, ellipsis in original), *Rucker v Lee Holding Co.*, 471 F.3d 6, 12 (1st Cir 2006) (DOL regulatory preamble entitled to "controlling weight") The Seventh Circuit's rejection of DOL's construction of § 404(c) and its own regulations is clearly at odds with this Court's precedents and should be reversed

II. THE COURT SHOULD REVIEW THE SEVENTH CIRCUIT'S INTERPRETATION OF § 404(a) BECAUSE IT ALSO CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND THE POSITION OF DOL

A. The Seventh Circuit's Newly Minted Defense To Fiduciary Liability For Imprudent Investment Selection Is At Odds With The Decisions Of Numerous Other Circuit Courts

The Seventh Circuit dismissed petitioners' allegations for failure to state a claim under § 404(a) of ERISA based on its conclusion – made without any discovery or evidentiary basis – that the specific

funds included by the Deere plans had a sufficiently wide range of fees that were "set against the backdrop of market competition." Pet. App. 19a. According to the Seventh Circuit, this range of funds and associated fees negated any duty by Deere to take advantage of available, lower-priced investment vehicles. Even though Deere could have obtained a better fee structure for its plans, "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." *Id.* at 19a-20a. The Seventh Circuit's holding is contrary to the decisions of numerous circuits and improperly curtails ERISA's fiduciary duty of prudent investment selection.

As this Court has recognized, ERISA's requirement that a plan fiduciary act with "the care, skill, prudence, and diligence" of "a prudent man acting in a like capacity and familiar with such matters," 29 U.S.C. § 1104(a)(1)(B), establishes an objective test derived from the common law's "prudent person" rule. *See Bruch*, 489 U.S. at 110-11, *see also, e.g.*, S. Rep. No. 93-127, at 29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 (§ 404(a) of ERISA, "in essence, codifies and makes applicable to fiduciaries certain principles developed in the evolution of the law of trusts"). The cornerstone of the common-law duty of prudence is the requirement that a trustee use due care in investigating the investment in light of the purposes of the trust and the best interests of the beneficiaries. *See* Restatement (Second) of Trusts § 212 cmts. a-c (1959).

Consistent with this core common-law principle, the majority of the federal circuits have recognized that "the most basic of ERISA's investment fiduciary duties" is "the duty to conduct an independent inves-

tigation into the merits of a particular investment." *In re Unisys Sav. Plan Litig*, 74 F 3d 420, 435 (3d Cir 1996) The test under § 404(a)(1)(B) of ERISA focuses on the "fiduciary's conduct in arriving at an investment decision, not on its results, and ask[s] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment" *Id* at 434, *see also, e g*, *DiFelice*, 497 F 3d at 418, 420; *Flanigan*, 242 F.3d at 86; *Roth v Sawyer-Cleator Lumber Co*, 16 F 3d 915, 917-18 (8th Cir. 1994), *Fink v National Sav & Trust Co*, 772 F 2d 951, 955-56 (D C Cir 1985); *Donovan v Mazzola*, 716 F.2d 1226, 1231-32 (9th Cir 1983), *Donovan v Cunningham*, 716 F 2d 1455, 1467 (5th Cir 1983)

DOL's regulations concerning the investment-selection duties of ERISA fiduciaries confirm ERISA's focus on the adequacy of the fiduciary's investigation Under those regulations, fiduciaries satisfy their duty of prudence under § 404(a) if they conduct a reasonable investigation and give "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment plays in that portion of the plan's investment portfolio." 29 C F R § 2550 404a-1(b)(1)(i)

The Seventh Circuit's singular focus on the result of Deere's investment decision – namely, the range of available mutual funds and fees – is at odds with these precedents because it "improperly focus[es] the breach of duty inquiry on results and ignore[s] the process by which a trustee made his decision." *Roth*, 16 F.3d at 918 Indeed, the crux of petitioners' claim

was that Deere could readily have selected other investment vehicles – such as institutional mutual funds – with significantly lower fees, by taking advantage of the plans' large size The three largest money managers, for example, charge an average fee of 0 08% to pension customers,[7] compared to the range of 0 07% to over 1% charged by Fidelity's retail mutual funds In dismissing this fact as "beside the point," Pet App 19a, the Seventh Circuit fundamentally departed from the longstanding rule adopted by its sister circuits that a "[c]ourt must inquire whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment" *Flanigan*, 242 F 3d at 86 (internal quotations omitted).

B. The Seventh Circuit's Holding Is Also At Odds With DOL's Policy Judgment

The decision below is also inconsistent with the position consistently adopted by DOL, both in this case and in other ERISA litigation. In addition to challenging the Seventh Circuit's erroneous interpretation of § 404(c), the Secretary contended that petitioners' allegations stated a claim for fiduciary breach and supported reversal of the district court's decision. *See* DOL Initial Br 23 Moreover, the Secretary argued in her brief on rehearing that petitioners' allegations – namely, that "fiduciaries failed to establish, implement and follow any procedures to prudently determine the reasonableness of the fees and, as a consequence, caused the multi-billion dollar

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[7] *See* Gretchen Morgenson, *Fair Game He Doesn't Let Money Managers Off the Hook*, N Y Times (Apr 11, 2009), *available at* http //www nytimes com/2009/04/12/business/12gret html?_r=2

Plans to pay excessive, retail-level fees" – were not only plausible but "factually supported by materials considered by the panel" DOL Rehearing Br 3. DOL criticized the panel for dismissing petitioners' cognizable allegations "in large part on a mistaken impression that plaintiffs' claims hinge on the fiduciaries' failure 'to scour the market to find and offer the cheapest possible fund'" *Id* at 9-10 [8] DOL also criticized as similarly "mistaken" the Seventh Circuit's "conclusion that the fees were necessarily prudent because the Plans' array of investment funds were offered 'to the general public' at the same expense ratios that the Plans paid." *Id.* at 10 The Secretary's submissions make clear that the decision below runs contrary to the settled views of DOL as the enforcement agency for Title I of ERISA

The Secretary's position in this case is also consistent with her position in other similar ERISA litigation. In *Braden v Wal-Mart Stores, Inc* , No 08-3798 (8th Cir argued Sept 24, 2009), the plaintiffs made substantially the same allegations as petitioners here – that Wal-Mart imprudently chose 10 retail

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[8] Contrary to the Seventh Circuit's mischaracterization, petitioners did not allege that plan fiduciaries must always pick the cheapest fund, rather, they alleged that Deere failed to conduct a diligent and prudent investigation to determine whether the retail mutual funds that were selected charged unnecessarily high fees As discussed herein, DOL has consistently viewed such allegations as stating a viable claim for fiduciary breach under § 404(a) *See also* BNA, *Fiduciary Responsibility Labor Department Official Faults Court for Not Deferring to 404(c) Regulation*, Pension & Benefits Daily (Apr 8, 2009) (statement of DOL official, Timothy Hauser, criticizing *Hecker* and stating that DOL's position is not that fiduciaries must get the "absolute cheapest product," but rather that they must "prudently consider[]" the trade-off between cost of the investment and the value received for that cost)

mutual funds with excessive fees because it failed to "conduct[] an adequate investigation of available fund options, fees and performance," and, moreover, "fail[ed] to use the Wal-Mart Plan's considerable bargaining power, given its massive size, to negotiate better fees for the Plan, instead choosing off-the-shelf products with their relatively higher fees." Br of Sec'y of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant 4, *Braden*, *supra* (filed Mar. 13, 2009) ("DOL *Braden* Br."), *available at* http://www.dol.gov/sol/media/briefs/braden(A)-03-13-2009.pdf. After the district court dismissed the complaint for failure to state a claim, the Secretary filed an *amicus* brief in support of the plaintiffs, in which she argued that the alleged "conduct, if true, would constitute a breach of fiduciary duty under ERISA and would make the responsible fiduciaries liable for any resulting losses." *Id.* at 10; *see id.* at 17-18.[9] Given the substantial similarity between the allegations in the two cases, the Secretary's position in *Braden* also supports reversal in this case.

In sum, the Secretary has taken the consistent position that petitioners' allegations of inadequate investigation and irresponsible refusal to use available bargaining power to obtain lower fees state a cognizable and plausible claim for breach of fiduciary duty under § 404(a) of ERISA, and would, if proven, entitle plaintiffs to recover any financial losses to the plans from the resulting excessive retail-level fees, despite § 404(c). That position represents "the agency's fair and considered judgment on the matter"

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[9] The Secretary's *amicus* brief in *Braden* attempted to distinguish the decision below as a litigation matter, but it did not abandon DOL's disagreement with that decision as a policy matter. *See* DOL *Braden* Br. 19-20 & n.7.

and thus warrants deference from this Court *Auer*, 519 U S. at 462 (deferring to DOL position taken in litigation); *Coke*, 551 U.S at 171 (same) If the Court deems it appropriate to have the Government express its views on the questions presented, petitioners request that the Court call for the views of the Solicitor General Petitioners believe, however, that DOL's past pronouncements make clear that the decision below conflicts with the agency's authoritative interpretation of § 404(a) and § 404(c) of ERISA

III. THIS COURT'S REVIEW IS WARRANTED NOW BECAUSE THE QUESTIONS PRESENTED HAVE ENORMOUS RAMIFICATIONS FOR AMERICAN WORKERS' PENSION PLANS

This Court should grant review of the decision below because it erred on a question of critical importance to American workers regarding the scope of a pension plan fiduciary's obligation to select appropriate investments for the plan The Seventh Circuit's decision is already being used as a blueprint for plan sponsors and administrators throughout the country to avoid ERISA's fiduciary protections against unnecessarily and imprudently high fees. As DOL predicted, these errant fiduciaries argue that, under the decision below, ERISA's fiduciary duties are met merely by including many retail mutual funds with a variety of fees.[10] Because of the tremendous negative impact of management fees on investment returns, the decision below threatens enormous dissipation of American employees' retirement assets In the Seventh Circuit alone, the decision will eviscerate

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[10] *See, e g*, Defs ' Mem in Support of Mot To Dismiss the Am Compl 5, *Loomis v Exelon Corp*, No 06 CV 4900 (N D Ill filed Sept 11, 2009)

fiduciary protections for millions of participants in plans worth hundreds of billions of dollars This case presents an ideal vehicle for this Court to resolve these critical questions

A. The Fiduciary Standard For Selection Of Investment Options Affects Millions Of American Employees Who Have Trillions Of Dollars Invested In ERISA-Governed Pension Plans

Whether a pension plan's fiduciary responsibilities include a duty to obtain lower fees by taking advantage of lower-priced investment options entails tremendous financial consequences for the tens of millions of American workers whose retirement assets are invested in pension plans governed by ERISA As of the first quarter of 2009 (even after the stock market crash of October 2008), American workers had assets of nearly $2 3 trillion in 401(k) plans alone *See U S Retirement Market* at 7 More than half of those 401(k) assets are in plans, such as Deere's, that have more than $500 million in assets and are thus far larger than needed feasibly to invest in institutional investment vehicles, such as institutional mutual funds, rather than higher-priced retail funds. *See* Investment Company Institute, Press Release, *A Number of Factors Impact Retirement Plan Fees, ICI-Deloitte Study Finds Plan Size, Contribution Rates, and Auto Enroll Associated with Lower Fees* (Apr 14, 2009)

As this Court recognized in granting certiorari in *Jones v Harris Associates L P*, 129 S Ct 1579 (2009) (No 08-586), the issue of mutual fund fees has a tremendous effect on the American economy and American investors. Studies have shown that even a small reduction in fees for such large pension plans

can significantly affect an individual's retirement savings over the life of the investment. For instance, one study estimates that the difference in the expense ratio of the typical institutional mutual fund and the typical retail mutual fund – 0 25% – can erode the value of a 401(k) by 6% over the average working life of an American employee *See, e g*, Hewitt Associates, Press Release, *Companies Can Save Millions of Dollars by Suspending Their 401(k) Match for Just One Year, According to New Hewitt Analysis* (Apr. 13, 2009), *see also* Morgenson, *supra* note 7 (noting that pension funds pay an expense ratio of, on average, 0.08% compared to 0 61% for mutual fund shareholders), DOL, *A Look At 401(K) Plan Fees, available at* http://www dol gov/ebsa/publications/401k_employee html (difference of 1% in fees would reduce plan assets by 28% over 35 years) Assuming a 0.25% differential, 401(k) plan participants whose assets are invested in retail mutual funds pay up to $1.2 billion annually in unnecessary fees that could be avoided if plan fiduciaries invested in lower-cost institutional investment options *See* Investment Company Institute, *The Economics of Providing 401(k) Plans· Services, Fees, and Expenses, 2008*, at 3, 9-10 (Aug 2009), *available at* http //www.idc org/pdf/fm-v18n6 pdf A rule that allows pension plan fiduciaries to invest in a range of retail mutual funds without investigating these lower-priced institutional investment vehicles will inflict enormous financial losses on the pension plan assets of tens of millions of American workers *See* DOL Rehearing Br 2 (describing the decision's "far-reaching ramifications").

This Court's immediate review is also critical because the Seventh Circuit's decision effectively exempts a significant proportion of the nation's

employees and retirement assets from ERISA's fiduciary duties of prudent investment selection Forty-seven Fortune 500 companies are headquartered geographically in the Seventh Circuit *See* http://money
cnn com/magazines/fortune/fortune500/2008/full_list/ The pension funds for those companies alone hold more than $125 billion in assets *See* http.//www brightscope.com/ratings Many more American corporations conduct significant business in the Chicago area and are therefore amenable to jurisdiction and venue in the Seventh Circuit The decision below thus directly affects millions of Americans and hundreds of billions of dollars in pension assets.

B. This Case Presents An Ideal Vehicle For Resolving The Important Questions Presented

The Court should not await further percolation of the questions presented in the lower courts. The proper standard for addressing a breach of fiduciary duty claim for imprudent investment selection under § 404(a) of ERISA has now been discussed in the courts of appeals for more than two decades *See supra* pp 23-24 Moreover, three circuits and DOL have considered whether § 404(c)'s safe harbor applies to claims of improper investment selection and have come to opposite conclusions *See supra* pp 14-16 The court below acknowledged its disagreement with DOL and the Fourth Circuit, *see* Pet App 26a, and the district courts are now also divided, *see supra* pp 16-18 These issues are thus ripe for this Court's review Declining to intervene will merely lead to further confusion and inconsistent results in the lower courts

In addition, this case is an ideal vehicle for resolving the questions presented. The Seventh Circuit's dismissal of petitioners' claim under Rule 12(b)(6) creates no jurisdictional questions, and there is no threshold issue that this Court would have to resolve before reaching the questions presented, which raise clean issues of legal interpretation Moreover, if the Seventh Circuit's holdings on the questions presented are reversed, there would be no alternative ground for affirming the district court's dismissal of petitioners' claim of fiduciary breach against Deere Because the Seventh Circuit's dismissal of petitioners' claim rested on rulings of law on which the circuit courts and DOL disagree, the case presents an ideal vehicle for resolution of the questions presented.

IV. IN THE ALTERNATIVE, THE COURT SHOULD HOLD THE PETITION FOR *JONES V. HARRIS ASSOCIATES*

In *Jones v Harris Associates L P.*, No 08-586, this Court granted certiorari to review a decision of a different panel of the Seventh Circuit, holding that, under § 36(b) of the Investment Company Act of 1940, a mutual fund shareholder's challenge to the excessiveness of the fees charged by the investment adviser to the fund could not withstand summary judgment unless the shareholder showed that the investment adviser actively misled the mutual fund's board of directors. Judge Easterbrook's decision for the panel concluded that § 36(b) should be construed narrowly to prevent only deception because the existence of a wide range of mutual funds is adequate "to put competitive pressure on advisory fees " *Jones v. Harris Assocs. L.P* , 527 F 3d 627, 634 (7th Cir 2008) Judge Posner's dissent from denial of rehearing *en banc*, joined by four other active judges, criticized

that assumption as resting on "an economic analysis that is ripe for reexamination," especially given that "[m]utual funds are a component of the financial services industry, where abuses have been rampant." *Jones v Harris Assocs L P*, 537 F.3d 728, 730 (7th Cir. 2008) (dissenting op.)

Both Judge Easterbrook and Judge Posner recognized in *Jones* that there are "substantial advisory fee level differences between equity pension fund portfolio managers and equity mutual fund portfolio managers." *Id* at 731 (dissenting op.) (internal quotations omitted), *accord* 527 F 3d at 634 (panel op.) Judge Posner noted that "advisory fees in the pension field are subject to a marketplace where arm's-length bargaining occurs," but advisory fees for mutual funds are not. 537 F.3d at 731-32 (dissenting op.) (internal quotations omitted) Tellingly, the evidence in *Jones* showed that mutual funds were charged more than double what their investment advisers charged arm's-length institutional investors, like pension funds To the extent this Court also recognizes these market realities, its decision will further support petitioners' claim that, in the pension fund marketplace, plan administrators normally seek lower fees through "arm's-length bargaining" and that Deere's failure to do so violated its fiduciary duties to the plans.

A hold for *Jones* is also appropriate because a reversal in that case will create a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v Chater*, 516 U.S 163, 167 (1996) (per curiam) (standard for GVR) The decision below rested on a critical premise – that selecting retail mutual funds was reasonable because

mutual fund fees are "set against the backdrop of market competition" (Pet App 19a) – that is directly at issue in *Jones*. *See* Pet Br 41-44, *Jones*, No 08-586, AARP & CFA *Amicus* Br in Support of Petitioners 13-26, *Jones*, No 08-586 (showing that market competition is ineffective to reduce retail mutual fund fees) If this Court agrees with Judge Posner that market forces are insufficient to hold mutual fund advisory fees to competitive levels, that conclusion necessarily will require reexamination of the *Hecker* court's ruling that Deere's selection of retail mutual funds satisfies ERISA's fiduciary duties because they were "set against the backdrop of market competition" Pet. App 19a.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,

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October 14, 2009

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 07-3605 & 08-1224

DENNIS HECKER, ET AL.,
Plaintiffs-Appellants,

v

DEERE & COMPANY, FIDELITY MANAGEMENT TRUST CO., AND FIDELITY MANAGEMENT & RESEARCH CO.,
Defendants-Appellees.

Argued Sept 4, 2008
Decided Feb 12, 2009

Before MANION, WOOD, and TINDER, Circuit Judges.

WOOD, Circuit Judge

Even before the stock market began its precipitous fall in early October 2008, litigation over alleged mismanagement of defined contribution pension plans was becoming common This type of litigation received a boost when, in *LaRue v DeWolff, Boberg & Associates, Inc*, --- U S ----, 128 S Ct 1020, 169 L.Ed 2d 847 (2008), the Supreme Court held that "a participant in a defined contribution pension plan [may] sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant's individual account" 128 S.Ct at 1022 Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U S C. § 1132(a), provides the basis for such an action.

The present case requires us to look further into two questions: first, how broadly does the concept of actionable misconduct sweep, and second, does someone who serves as the manager and investment advisor for a 401(k) plan, or for some of the plan's investment options, owe fiduciary duties to the sponsor's employees These questions arise in a lawsuit brought by some employees of Deere & Company, which sponsors two 401(k) plans relevant to this case Fidelity Management Trust Company ("Fidelity Trust") is the directed and recordkeeper for the Deere plans, it also manages two of the investment vehicles available to plan participants. Fidelity Management & Research Company ("Fidelity Research") is the investment advisor for the mutual funds offered as investment options under Deere's plans

Named plaintiffs Dennis Hecker, Jonna Duane, and Janice Riggins ("the Hecker group"), seeking to sue both on their own behalf and for a class of plan participants, asserted in their second amended complaint ("Complaint") that Deere violated its fiduciary duty under ERISA by providing investment options that required the payment of excessive fees and costs and by failing adequately to disclose the fee structure to plan participants The Hecker group also sued Fidelity Trust and Fidelity Research on the theory that they were functional fiduciaries for the class and thus they too were liable under § 1132(a) All three defendants moved to dismiss for failure to state a claim, see FED.R CIV.P 12(b)(6) The district court concluded that the case could be resolved at that preliminary stage, granted the motions to dismiss without resolving the class certification motion, and entered judgment for the defendants Later, the

court also denied plaintiffs' motion under Rule 59(e) We conclude that the district court correctly found that plaintiffs failed to state a claim against any of the defendants, and we therefore affirm the district court's judgment.

I

A

In 1990, Deere engaged Fidelity Trust to serve as trustee of two of the 401(k) plans ("the Plans") it offers to its employees The Plans, everyone agrees, are subject to ERISA, and the three named plaintiffs are participants in them Under its arrangement with Deere, Fidelity Trust was required to advise Deere on what investments to include in the Plans, to administer the participants' accounts, and to keep records for the Plans

Each Plan offered a generous choice of investment options for Plan participants the menu included 23 different Fidelity mutual funds, two investment funds managed by Fidelity Trust, a fund devoted to Deere's stock, and a Fidelity-operated facility called BrokerageLink, which gave participants access to some 2,500 additional funds managed by different companies Fidelity Research advised the Fidelity mutual funds offered by the Plans Each plan participant decided for herself where to put her 401(k) dollars, the only limitation was that the investment vehicle had to be one offered by the Plan Each fund included within the Plans charged a fee, calculated as a percentage of assets the investor placed with it The Hecker group alleges that Fidelity Research shared its revenue, which it earned from the mutual fund fees, with Fidelity Trust Fidelity Trust in turn compensated itself through those shared fees, rather than through a direct charge to Deere for its services

as trustee. As the Hecker group sees it, this led to a serious – in fact, impermissible – lack of transparency in the fee structure, because the mutual fund fees were devoted not only to the (proper) cost of managing the funds, but also to the (improper) cost of administering Deere's 401(k) plans.

Distressed primarily by the fee levels, the Hecker group filed this suit individually and on behalf of a class against Deere, Fidelity Trust, and Fidelity Research, asserting that all three defendants had breached their duties under ERISA The second amended complaint is the version on which the district court based its ruling Paragraph 11 summarizes the plaintiffs' theory as follows: " . the fees and expenses paid by the Plans, and thus borne by Plan participants, were and are unreasonable and excessive; not incurred solely for the benefit of the Plans and the Plans' participants; and undisclosed to participants By subjecting the Plans and the participants to these excessive fees and expenses, and by other conduct set forth below, the Defendants violated their fiduciary obligations under ERISA."

As we have already noted, Deere appointed Fidelity Trust to be trustee of the Plans Fidelity Trust also performed administrative tasks for the Plans and managed two of the investment options available to the participants. Deere and Fidelity Trust agreed that Deere would limit the selections available to Deere's employees to Fidelity funds, with the exception of the Deere Common Stock Fund and some other minor guaranteed investment contracts. Fidelity Research served as the investment advisor for 23 out of the 26 investment options in the Plans None of the Fidelity Research funds operated exclusively for Deere employees, all were available on the open

market for the same fee The Complaint alleges that Fidelity Research "maintains an active Revenue Sharing program, charging more for its services than it expects to keep in order to have additional monies with which to pay its affiliates and business partners." Those charges, plaintiffs allege, were excessive and unreasonable Deere, in their view, failed to monitor Fidelity Trust's actions properly and failed to keep the participants properly informed

A few more details about the Plans themselves are helpful. One plan was called the Savings & Investment Plan, or SIP, and the other was the Tax Deferred Savings Plan, or TDS For all practical purposes, they operated the same way. Qualified employees could contribute up to a certain amount of their pre-tax earnings, and Deere would match those contributions in varying percentages up to 6%. Deere also made profit-sharing contributions on behalf of some participants All participants were fully vested from the start with respect to their own contributions and were vested after three years' service with respect to the Deere contribution By the end of 2005, the SIP had more than $2 billion in assets. more than $1 3 billion of that was held in Fidelity retail mutual funds. The TDS had more than $500 million in assets by that time, $244 million of which were held in Fidelity retail mutual funds

B

Almost twenty years ago, the Supreme Court observed that "ERISA abounds with the language and terminology of trust law " *Firestone Tire and Rubber Co v Bruch*, 489 U S. 101, 110, 109 S Ct 948, 103 L Ed 2d 80 (1989). The Act's fiduciary responsibility provisions, found at 29 U S.C §§ 1101-14, are central to the Hecker group's case Plaintiffs begin with

§ 1103(c)(1), which says that, except as provided in certain other parts of the statute, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." Plan fiduciaries must discharge their duties "solely in the interest of the participants and beneficiaries." 29 U.S.C § 1104(a)(1). Section 1104 recognizes an exception to that duty, however, for plans that delegate control over assets directly to the participant or beneficiary. The key language reads as follows

> (c) Control over assets by participant or beneficiary
>
> (1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –
>
> > (i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
> >
> > (ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

29 U.S C. § 1104(c)(1) Finally, the Hecker group relies on 29 U S C § 1105(a), which provides that one fiduciary may be liable for breaches of fiduciary duty committed by another fiduciary under specified circumstances.

C

The district court disposed of the case on the pleadings, as we noted above In evaluating the case, the court had to decide whether the Complaint included "enough facts to state a claim to relief that is plausible on its face." *Khorrami v Rolince*, 539 F.3d 782, 788 (7th Cir 2008) (quoting *Bell Atl Corp v. Twombly*, 550 U.S. 544, 127 S Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)), see *Davis v Indiana State Police*, 541 F.3d 760, 763-64 (7th Cir 2008) Even after *Twombly*, courts must still approach motions under Rule 12(b)(6) by "construi[ing] the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor." *Tamayo v. Blagojevich*, 526 F 3d 1074, 1081 (7th Cir.2008)

Looking first at plaintiffs' claims against Deere, the district court found that the company had complied with all applicable disclosure requirements found in ERISA It saw nothing in the statute or regulations that required Deere to disclose the fact that Fidelity Research was sharing part of the fees it received with its corporate affiliate, Fidelity Trust Materials furnished to plan participants did disclose the expenses actually paid to the fund managers, as plaintiffs implicitly conceded by alleging that the same fees were charged to all retail fund customers. The district court found it unremarkable that those fees included some profit margin for Fidelity Research It also thought it "unlikely" that the fund sponsor (Deere)

would be able to control the way in which the fund manager distributed its profits, particularly among related corporations. The court also noted that there were proposals to amend the regulations so that revenue sharing arrangements would be disclosed See Proposed Rules, Department of Labor, Employee Benefits Security Administration, 71 Fed Reg 41,392, 41,394 (July 21, 2006). This, it thought, made it apparent that the present rules imposed no such obligation Finally, the court rejected the plaintiffs' argument that disclosure was required as a general matter of ERISA law

The Hecker group also asserted that Deere and the Fidelity companies breached their fiduciary obligations by selecting for the Plans investment options with unreasonably high fees ERISA, the court acknowledged, requires a fiduciary to discharge its duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S C. § 1104(a)(1)(B) But (as we already have observed) the statute also provides a "safe harbor" for plans that permit the participant to exercise control over his or her own assets 29 U S.C § 1104(c) Assuming that the "safe harbor" provision establishes an affirmative defense, the court held that the defendants could take advantage of the defense only if the facts asserted in the Complaint established all of its necessary elements, as set forth in 29 C.F R. § 2550.404c-1. It then concluded that the defendants had met that burden, explaining itself as follows:

> Participants could choose to invest in twenty primary mutual funds and more than 2500 others

through BrokerageLink All of these funds were also offered to investors in the general public so expense ratios were necessarily set to attract investors in the marketplace The expense ratios among the twenty primary funds ranges from just over 1% to as low as 07% Unquestionably, participants were in a position to consider and adjust their investment strategy based in part on the relative cost of investing in these funds It is untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios The only possible conclusion is that to the extent participants incurred excessive expenses, those losses were the result of participants exercising control over their investments within the meaning of the safe harbor provision

Last, the district court held that since plaintiffs had failed to state a claim against Deere for breach of fiduciary duty either for failure to disclose or for the selection of investment options, Fidelity could not be held liable either Moreover, it added, neither Fidelity defendant had fiduciary responsibilities with respect to either of the tasks plaintiffs targeted Under the trust agreements, Deere had the sole responsibility for the selection of plan investment funds Thus, even if the Fidelity defendants were fiduciaries for some purposes, they were not fiduciaries for the purpose of making plan investment decisions

After the court dismissed their case, plaintiffs moved for reconsideration under FED R.CIV.P. 59(e), asserting that they had new evidence that would establish (1) the defendants' breach of duty in assessing fees and choosing investment options, (2) the fact that the defendants' failure to provide information about revenue sharing was an independent violation

of ERISA, and (3) the impropriety of the court's evaluating the "safe harbor" defense on a motion to dismiss. Finding nothing new in their arguments or evidence, the court denied the motion. Later, it awarded costs in the amount of $54,396 57 for Deere and $163,814 43 for the two Fidelity defendants. This appeal followed In addition to briefs from the parties, the court has had the benefit of *amicus curiae* briefs filed by the Secretary of Labor (supporting plaintiffs) and by a consortium composed of the ERISA Industry Committee, the National Association of Manufacturers, and the American Benefits Council (supporting defendants)

II

The Hecker group has offered numerous reasons for sending this case back to the district court. For convenience, we have organized the issues as follows: (1) did the district court commit a procedural error warranting reversal by considering documents outside the pleadings; (2) were the Fidelity defendants "functional" fiduciaries of the Plans with respect to the selection of investment options, the structure of the fees, or the provision of information regarding the fee structure; (3) did Deere or the Fidelity defendants breach any fiduciary duties toward plaintiffs, and if so, are they protected by the § 1104(c) affirmative defense, (4) did the district court abuse its discretion in denying plaintiffs' Rule 59(e) motion, and (5) did the court err in its costs award to the defendants, either by giving excessive costs or by including items that are not authorized by 28 U.S C § 1920?

1 Materials Outside Complaint

Deere's motion to dismiss under Rule 12(b)(6) included a number of attached documents seven Summary Plan Descriptions ("SPDs"), two SPD sup-

plements, the Trust Agreement between Fidelity Trust and Deere, and three fund prospectuses that it had retrieved from Fidelity's website. According to plaintiffs, this amounted to some 900 pages of material Fidelity's motion added two more trust agreements to the mix. Plaintiffs objected to the introduction of these documents, arguing that they were "matters outside the pleadings" within the meaning of Rule 12(d), and thus that the court should have converted the two motions into motions for summary judgment The district court, however, found that these were all documents to which the Complaint had referred, that the documents were concededly authentic, and that they were central to the plaintiffs' claim. *See Tierney v Vahle*, 304 F 3d 734, 738 (7th Cir 2002). If the court erred in this respect, we would be able to dispense with most of the rest of this appeal, since it would be necessary to remand on this basis alone

This court has been relatively liberal in its approach to the rule articulated in *Tierney* and other cases *See, e g , Wright v Associated Ins Cos* , 29 F.3d 1244, 1248 (7th Cir.1994) (upholding consideration of an agreement quoted in the complaint and central to the question whether a property interest existed for purposes of 42 U.S.C. § 1983), *Venture Associates v Zenith Data Sys* , 987 F.2d 429, 431 (7th Cir 1992) (admitting letters, to which the complaint referred, that established the parties' contractual relationship), *Ed Miniat, Inc v Globe Life Ins Group, Inc.*, 805 F.2d 732, 739 (7th Cir 1986) (permitting reference to a welfare plan referred to in the complaint in order to decide whether the plan qualifies under ERISA). Plaintiffs see the case of *Travel Over the World v Kingdom of Saudi Arabia*, 73 F.3d 1423

(7th Cir 1996), as a counterexample, but we do not read it that way In *Travel Over the World*, the plaintiffs contested the authenticity of the document that defendants wanted to use, here, they do not. Although they argue that certain statements in the documents are untrue (such as the representation that Deere pays all administrative costs associated with the Plans), the district court took plaintiffs' point of view on all such disputes Deere and the two Fidelity defendants offered the documents only to show what they disclosed to plaintiffs, nothing plaintiffs have argued explains why the documents could not be used in that limited way

For the purpose to which they were put, the SPDs, the SPD supplements, and the Trust Agreement fit within the exception to Rule 12(d)'s general instruction. The Complaint explicitly refers to the SPDs and the Trust Agreement, and both are central to plaintiffs' case: the SPDs reveal the disclosures that Deere made to the Plan participants, and the Trust Agreement throws light on the relationship between Fidelity Trust and Deere. The supplements to the SPDs, while not mentioned separately in the Complaint, serve much the same purpose as the originals. The Complaint did not mention the prospectuses, but these were publicly available documents and thus relevant to the question of disclosure In a similar situation, the Second Circuit held that a court could take notice of a prospectus in a securities fraud case See *I Meyer Pincus & Assocs , P C v Oppenheimer & Co* , 936 F.2d 759, 762 (2d Cir 1991), see also *Menominee Indian Tribe of Wisc v Thompson*, 161 F 3d 449, 456 (7th Cir 1998) (permitting consideration on a motion for judgment on the pleadings under Rule 12(c) of historical papers relating to negotiation of a

treaty with Native American Tribe) Taking into account the limited purpose to which the prospectuses were put here, the district court acted within its discretion when it chose not to convert the defendants' motion under Rule 12(b)(6) to a motion for summary judgment

2 Functional Fiduciaries

Before we delve into the question whether any of the defendants breached a fiduciary duty, we must identify who owed such duties to plaintiffs with respect to the actions at issue here Deere does not contest the fact that it owed some fiduciary duties to the plan participants, it argues instead that plaintiffs have too expansive a concept of its fiduciary responsibilities and, in any event, that it did not breach any fiduciary duty Fidelity Trust and Fidelity Research, in contrast, argue that they were not fiduciaries at all. The Hecker group appears to concede that neither Fidelity entity was a named fiduciary under the Trust Agreement. It argues, however, that one or both of the Fidelity entities functioned as a fiduciary under 29 U S C § 1002(21)(A) In order to find that they were "functional fiduciaries," we must look at whether either Fidelity Trust or Fidelity Research exercised discretionary authority or control over the management of the Plans, the disposition of the Plans' assets, or the administration of the Plans

The Hecker group first argues that Fidelity Trust exercised the necessary control to confer fiduciary status by its act of limiting Deere's selection of funds through the Trust Agreement to those managed by Fidelity Research But what if it did? Plaintiffs point to no authority that holds that limiting funds to a sister company automatically creates discretionary control sufficient for fiduciary status To the con-

trary, as Fidelity points out, there are cases holding that a service provider does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms. *Chi Dist Council of Carpenters Welfare Fund v. Caremark, Inc* , 474 F.3d 463 (7th Cir.2007), *Schulist v. Blue Cross of Iowa*, 717 F.2d 1127 (7th Cir 1983). In any event, the Trust Agreement gives Deere, not Fidelity Trust, the final say on which investment options will be included The fact that Deere may have discussed this decision, or negotiated about it, with Fidelity Trust does not mean that Fidelity Trust had discretion to select the funds for the Plans

Plaintiffs retort that, notwithstanding the language of the Trust Agreement, Fidelity Trust exercised *de facto* control over the selection of the funds and Deere rubber-stamped its recommendations That is not, however, what the Complaint alleges. It asserts instead that Fidelity Trust "played a role in the selection of investment options," Complaint ¶ 21, and it concedes that Deere had "final authority," *id* Merely "playing a role" or furnishing professional advice is not enough to transform a company into a fiduciary. *Pappas v Buck Consultants, Inc.*, 923 F 2d 531, 535 (7th Cir 1991), *Farm King Supply, Inc Integrated Profit Sharing Plan & Trust v. Edward D Jones & Co* , 884 F.2d 288, 292 (7th Cir.1989). Many people help develop and manage benefit plans – lawyers and accountants, to name two groups – but despite the influence of these professionals we do not consider them to be Plan fiduciaries This is not a case like *Johnson v Georgia*, 19 F 3d 1184, 1189 (7th Cir. 1994), on which plaintiffs rely, because in that case the fiduciary both managed a defined-benefits plan

and had ultimate authority over the selection of funds Nor do we find plaintiffs' reference to the district court's decision in *Haddock v Nationwide Fin Servs* , 419 F Supp 2d 156 (D Conn 2006), helpful or persuasive, since the service provider in that case had the authority to delete and substitute mutual funds from the plan without seeking approval from the named fiduciary

There is an important difference between an assertion that a firm exercised "final authority" over the choice of funds, on the one hand, and an assertion that a firm simply "played a role" in the process, on the other hand The Complaint on which the Hecker group proceeded made the latter allegation, not the former It gave no notice to the defendants that they would be required to defend on the former basis. For that reason, we reject plaintiffs' tardy effort to present the *de facto* fiduciary argument, and we make no comment on the possible scope of the "functional fiduciary" concept.

Plaintiffs also argue that Fidelity Research, and possibly Fidelity Trust, exercised discretion over the disposition of the Plans' assets by determining how much revenue Fidelity Research would share with Fidelity Trust The Fidelity defendants (with the support in this instance of the Department of Labor) respond that the fees that Fidelity Research collected were not Plan assets under 29 U S C § 1101(b)(1) The fees were drawn from the assets of the mutual funds in question, which, as the statute provides, are not assets of the Plans

> In the case of a plan which invests in any security issued by a [mutual fund], the assets of such plan shall be deemed to include such security but shall

> not, solely by reason of such investment, be deemed to include any assets of such [mutual fund]

Id Once the fees are collected from the mutual fund's assets and transferred to one of the Fidelity entities, they become Fidelity's assets – again, not the assets of the Plans See also *Caremark*, 474 F 3d at 476 n 6

We conclude that the Complaint fails to state a claim against either Fidelity Trust or Fidelity Research based on the supposition that either one is a "functional fiduciary." Plaintiffs' effort to proceed against these companies thus fails at the threshold.

3 Fiduciary Duties and the Safe Harbor Defense

a Violation of Fiduciary Duty

We are thus left with the claim against Deere Plaintiffs' allegations can be distilled into two assertions· (1) Deere breached its fiduciary duty by not informing the participants that Fidelity Trust received money from the fees collected by Fidelity Research, and (2) Deere imprudently agreed to limit the investment options to Fidelity Research funds and therefore offered only investment options with excessively high fees We analyze each claim in turn, beginning with the fee distribution

Critical to plaintiffs' case is the proposition that Deere and Fidelity had a duty to disclose the revenue-sharing arrangements that existed between Fidelity Trust and Fidelity Research. They point to a number of facts in support of their theory From 1991 through 2007, Deere and Fidelity Trust amended their agreement 27 times to add new Fidelity services and products and to adjust the administrative costs that Deere paid up front to Fidelity Trust. Those costs decreased over time, as Fidelity Trust shifted to a

system whereby it recovered its costs from the Deere participants in the same way as it did from outside participants – that is, Fidelity Research would assess asset-based fees against the various mutual funds, and then transfer some of the money it collected to Fidelity Trust

The Hecker group's case depends on the proposition that there is something wrong, for ERISA purposes, in that arrangement The district court found, to the contrary, that such an arrangement (assuming at this stage that the Complaint accurately described it) violates no statute or regulation We agree with the district court Plaintiffs feel misled because the SPD supplements left them with the impression that Deere was paying the administrative costs of the Plans, even though in reality the participants were paying through the revenue sharing system we have described. But, as Deere and Fidelity both point out and the Complaint acknowledges, the participants were told about the total fees imposed by the various funds, and the participants were free to direct their dollars to lower-cost funds if that was what they wished to do The SPD supplements told participants to look to the fund prospectuses for detailed information on fund-level expenses, and the prospectuses in fact furnished that information In its brief, Deere points to the Magellan Fund Prospectus as an example That prospectus broke down the Fund's total annual operating expenses paid from fund assets (0 59%) as follows management fee, 0 39%; distribution or service fees, none; other expenses, 0 20%

The fact that there were no *additional* fees borne by Deere is immaterial. While Deere may not have been behaving admirably by creating the impression that it was generously subsidizing its employees'

investments by paying something to Fidelity Trust when it was doing no such thing, the Complaint does not allege any particular dollar amount that was fraudulently stated. How Fidelity Research decided to allocate the monies it collected (and about which the participants were fully informed) was not, at the time of the events here, something that had to be disclosed. It follows, therefore, that the Hecker group failed to state a claim against Deere based on the revenue-sharing arrangement and the lack of disclosure about it

These conclusions go a long way toward disposing of plaintiffs' claims that the non-disclosure of the revenue-sharing breached the general fiduciary duty imposed on Deere by 29 U S C § 1104(a)(1). Before such a violation can be found, there must be either an intentionally misleading statement, see *Varity Corp v. Howe*, 516 U.S. 489, 505, 116 S.Ct 1065, 134 L.Ed.2d 130 (1996), or a material omission, see *Anweiler v. American Elec. Power Serv Corp* , 3 F.3d 986, 992 (7th Cir.1993) The Complaint does not allege that the representation in the SPD supplement – that Deere paid the administration expenses for the Plans – was an intentional misrepresentation To the contrary, plaintiffs have since submitted evidence with their Rule 59(e) motion showing that Deere believed that Fidelity Trust's services were free.

The only question is thus whether the omission of information about the revenue-sharing arrangement is material Deere disclosed to the participants the total fees for the funds and directed the participants to the fund prospectuses for information about the fund-level expenses. This was enough. The total fee, not the internal, post-collection distribution of the

fee, is the critical figure for someone interested in the cost of including a certain investment in her portfolio and the net value of that investment Plaintiffs argue that some investors may have expected better management from a fund with a higher fee, but, as the Magellan Fund Prospectus illustrates, participants had access to information about management expenses as a percentage of fund assets. The later distribution of the fees by Fidelity Research is not information the participants needed to know to keep from acting to their detriment See *Bowerman v. Wal-Mart Stores, Inc* , 226 F 3d 574, 589-91 (7th Cir.2000) The information is thus not material, and its omission is not a breach of Deere's fiduciary duty

We turn next to plaintiffs' contention that Deere violated its fiduciary duty by selecting investment options with excessive fees In our view, the undisputed facts leave no room for doubt that the Deere Plans offered a sufficient mix of investments for their participants. Thus, even if, as plaintiffs urge, there is a fiduciary duty on the part of a company offering a plan to furnish an acceptable array of investment vehicles, no rational trier of fact could find, on the basis of the facts alleged in this Complaint, that Deere failed to satisfy that duty As the district court pointed out, there was a wide range of expense ratios among the twenty Fidelity mutual funds and the 2,500 other funds available through BrokerageLink At the low end, the expense ratio was 07%, at the high end, it was just over 1% Importantly, all of these funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition. The fact that it is possible that some other funds might have had even lower ratios is beside the point,

nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)

As for the allegation that Deere improperly limited the investment options to Fidelity mutual funds, we find no statute or regulation prohibiting a fiduciary from selecting funds from one management company. A fiduciary must behave like a prudent investor under similar circumstances; many prudent investors limit themselves to funds offered by one company and diversify within the available investment options As we have noted several times already, the Plans here directly offered 26 investment options, including 23 retail mutual funds, and offered through BrokerageLink 2,500 non-Fidelity funds We see nothing in the statute that requires plan fiduciaries to include any particular mix of investment vehicles in their plan. That is an issue, it seems to us, that bears more resemblance to the basic structuring of a Plan than to its day-to-day management Compare *Hughes Aircraft Co v. Jacobson*, 525 U.S. 432, 443-44, 119 S Ct 755, 142 L Ed 2d 881 (1999), *Lockheed Corp v Spink*, 517 U.S. 882, 890, 116 S Ct 1783, 135 L Ed.2d 153 (1996) We therefore question whether Deere's decision to restrict the direct investment choices in its Plans to Fidelity Research funds is even a decision within Deere's fiduciary responsibilities On the assumption that it is, however, we nonetheless conclude that taking the allegations in the Complaint in the light most favorable to plaintiffs, no breach of a fiduciary duty on Deere's part has been described.

b Safe Harbor Defense

Even if we have underestimated the fiduciary duties that Deere had to its plan participants, the district court's judgment in favor of the defendants must stand if that court correctly decided that the safe harbor provided in 29 U.S C § 1104(c) is available to them This was the ground on which the district court primarily relied. If the defense is available, it provides an alternate ground for affirmance

Although ERISA normally imposes a fiduciary duty on plan managers, the statute modifies that rule for plans that provide for individual accounts and allow a participant or beneficiary "to exercise control over the assets in his account" 29 U S C § 1104(c)(1) First, the participant must have the right to exercise independent control over the assets in her account and in fact exercise such control Next, the participant must be able to choose "from a broad range of investment alternatives." 29 C.F R § 2550 404c-1(b)(1)(ii) As we noted in *Jenkins v Yager*, 444 F 3d 916 (7th Cir 2006), "prominent among [the conditions a plan must meet] is that it must provide at least three investment options and it must permit the participants to give instructions to the plan with respect to those options at least once every three months 29 C F R § 2550 404c-1(b)(2)(c)" 444 F 3d at 923 Third, the participant must be given or have the opportunity to obtain "sufficient information to make informed decisions with regard to investment alternatives available under the plan." 29 C F.R. § 2550 404c-1(b)(2)(i)(B) The regulation sets forth nine criteria that must be met before the participant may be considered to have sufficient investment information *Id* Those criteria call for such things as clear labeling of the plan as § 1104(c) instrument, a description of the investment alternatives available,

identification of designated investment managers, explanation of how to give investment instructions, a description of "any transaction fees and expenses which affect the participant's . . . balance in connection with purchases or sales of interests," *id* § 2550 404c-1(b)(2)(i)(B)(1)(v), relevant names and addresses of plan fiduciaries, special rules for employer securities, special rules for investment alternatives subject to the Securities Act of 1933, and materials related to voting, tender, or other rights incidental to the holdings in the account Other parts of the regulation emphasize that the fiduciary must furnish extensive information on the operating expenses of the investment alternatives, copies of relevant financial information, and other similar materials. *Id.* § 2550.404c-1(b)(2)(i)(B)(2).

The regulation does not require plans to offer only cost-free investment vehicles. It recognizes that a plan "does not fail to provide an opportunity for a participant or beneficiary to exercise control over his individual account merely because it . imposes charges for reasonable expenses" *Id* § 2550.404c-1(b)(2)(ii)(A) Procedures must be in place, however, to inform participants of the actual expenses incurred with respect to their individual accounts *Id* Other parts of the regulation address the required frequency of investment instructions. Finally (for our purposes), the regulation provides that independent control will not be found if a plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary. *Id.* § 2550 404c1(c)(2)(ii)

The regulation sums up the effect of a finding of independent exercise of control, from the perspective of a plan fiduciary, as follows

> If a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over as-sets in his individual account in the manner described in paragraph (c), then no other person who is a fiduciary with respect to such plan shall be liable for any loss, or with respect to any breach of part 4 of title I of the Act, that is the direct and necessary result of that participant's or beneficiary's exercise of control

Id. § 2550 404c-1(d)(2)(i) The safe harbor provided by § 1104(c) is an affirmative defense to a claim for breach of fiduciary duty under ERISA *In re Unisys Sav Plan Litig* , 74 F 3d 420, 446 (3d Cir.1996)

Although normally a district court should not base a dismissal under Rule 12(b)(6) on its assessment of an affirmative defense, see *U.S Gypsum Co v Indiana Gas Co* , 350 F.3d 623, 626 (7th Cir 2003), that rule does not apply when a party has included in its complaint "facts that establish an impenetrable defense to its claims" *Tamayo v Blagojevich*, 526 F 3d 1074, 1086 (7th Cir 2008). In *Tamayo*, we went on to explain that "[a] plaintiff pleads himself out of court when it would be necessary to contradict the complaint in order to prevail on the merits . . . If the plaintiff voluntarily provides unnecessary facts in her complaint, the defendant may use those facts to demonstrate that she is not entitled to relief" *Id.* (internal citations and quotation marks omitted)

Plaintiffs here chose to anticipate the § 1104(c) defense in their Complaint explicitly and thus put it in play Paragraph 58 begins by noting that "ERISA § 404(c) provides to Plan fiduciaries a 'Safe Harbor' from liability for losses that a participant suffers in his or her 401(k) accounts to the extent that the participant exercises control over the assets in his or her

401(k) accounts." Paragraphs 58 through 61 describe the information that Deere, as a plan fiduciary, was required to furnish Later, the Complaint has a section entitled "Defendants' Non-Compliance with § 404(c)'s Safe Harbor Requirements and Concealment of Its Fiduciary Breaches" Paragraphs 91 through 101 specify exactly what Deere and Fidelity allegedly failed to do For example, paragraphs 91 and 100(c) and (e) accuse them of failing to disclose that Fidelity was engaged in revenue sharing among its different entities Paragraphs 93 and 100(b) assert that Plan participants did not have complete knowledge of the fees and expenses that were being charged to the Plans and that were reducing their account balances Paragraphs 95 and 101(i) charge, among other things, that Deere and Fidelity failed to disclose their agreement that Deere would offer only Fidelity-related funds for the Plans The district court concluded that the Complaint so thoroughly anticipated the safe-harbor defense that it could reach that issue; we agree with it, bearing in mind that we must still consider any factual allegations in the light most favorable to plaintiffs

The Hecker group argues that even if the Complaint anticipated the safe-harbor defense, further proceedings are needed because the Complaint did not address all of the 25 or so different requirements that must be met in order to establish it definitively. Deere implies that this overstates the number of requirements, but its primary point is that plaintiffs have waived the right to complain about the Plans' compliance with all but two criteria – the obligation to disclose fund-level fees and the level of expenses (see 29 C F R §§ 2550.404c-1(b)(2)(i)(B)(1)(v) and (B)(2)(i)) In some instances, it is inappropriate to

jump to the conclusion that a point has been waived when a case is being decided on the pleadings, but this is not such a case. Plaintiffs chose to discuss § 1104(c) extensively in the Complaint and to specify the ways in which the Plans fell short for purposes of the defense To shift grounds now would undermine the notice that defendants gleaned from the Complaint, to their prejudice

Restricting our analysis to the challenges in the Complaint, we see no plausible allegation that the Plans do not comply with § 1104(c) Plaintiffs have focused on matters that are not helpful to them in the end, namely, the defendants' failure to disclose non-public material information, their revenue-sharing arrangements, and their decision to offer only Fidelity Research mutual funds As we have already noted, however, the regulations implementing the safe-harbor defense describe in detail the expenses and fees that must be disclosed The fee distribution by the management company post-collection is not one of those fees See 29 C F R §§ 2550.404c1(b)(2)(i)(B)(1)(v), (2)(i) And, as we have already explained, the revenue-sharing arrangement between the Fidelity defendants is not material information for a participant's investment decision The central question is thus whether the alleged misconduct – the imprudent selection of mutual funds with excessively high fees – falls within the safe harbor

Plaintiffs begin with a broadside attack, asserting that the defense has no application to a fiduciary's "assembling an imprudent menu [of investment options] in the first instance." *DiFelice v U S Airways, Inc* , 497 F.3d 410, 418 n. 3 (4th Cir.2007) Deere and Fidelity respond that there are no exceptions to

§ 1104(c)'s safe harbor, which in terms applies to "any" breach committed by someone "who is otherwise a fiduciary." Pinning their hopes on a footnote to the preamble to the implementing regulations, see 57 Fed Reg 46906-01, 46, 924 n 27 (Oct 13, 1992), plaintiffs argue that the Secretary has carved out the activity of designating investment options from the safe harbor Fidelity and Deere respond that this type of informal commentary, which was never embodied in the final regulations, cannot override the language of the statute and regulations

Plaintiffs would like us to decide whether the safe harbor applies to the selection of investment options for a plan, but in the end we conclude that this abstract question need not be resolved to decide this case Even if § 1104(c) does not always shield a fiduciary from an imprudent selection of funds under every circumstance that can be imagined, it does protect a fiduciary that satisfies the criteria of § 1104(c) and includes a sufficient range of options so that the participants have control over the risk of loss. *Cf Langbecker v. Electronic Data Sys Corp* , 476 F.3d 299, 310-11 (5th Cir.2007), and *Unisys*, 74 F 3d at 445 (holding that a fiduciary that committed a breach of duty in making an investment decision for a Plan may nevertheless take advantage of the § 1104(c) defense), but see *DiFelice*, 497 F 3d at 418 n 3 The regulation addresses the investment options by stipulating that the § 1104(c) defense is available only if the plan offers "a broad range of investment alternatives." 29 C F.R § 2550.404c-1(b)(3) The necessary broad range exists "only if the available investment alternatives are sufficient to provide the participant or beneficiary with a reasonable opportunity to" accomplish three goals: the abil-

ity materially to affect potential return and degree of risk in the investor's portfolio, a choice from at least three investment alternatives each of which is diversified and has materially different risk and return characteristics, and the ability to diversify sufficiently so as to minimize the risk of large losses *Id* §§ 2550 404c1(b)(3)(i)(A)-(C)

Interestingly, in light of the inclusion of the BrokerageLink facility in the plans available to the Deere participants, the regulation also notes that "[w]here look-through investment vehicles are available as investment alternatives to participants and beneficiaries, the underlying investments of the look-through investment vehicles shall be considered in determining whether the plan satisfies the requirements of [the regulation] " *Id* § 2550.404c-1(b)(3)(ii). The 2,500 mutual funds available through BrokerageLink had fees ranging from 07% to 1% Any allegation that these options did not provide the participants with a reasonable opportunity to accomplish the three goals outlined in the regulation, or control the risk of loss from fees, is implausible, to use the terminology of *Twombly* Plaintiffs complain that non-Fidelity funds were available only through BrokerageLink, but that is immaterial under this regulation If particular participants lost money or did not earn as much as they would have liked, that disappointing outcome was attributable to their individual choices Given the numerous investment options, varied in type and fee, neither Deere nor Fidelity (assuming for the sake of argument that it somehow had fiduciary duties in this respect) can be held responsible for those choices

4 Rule 59(e) Motion to Alter or Amend

After the district court entered judgment, the Hecker group filed a timely motion under FED.R CIV.P. 59(e) in which it argued that newly discovered evidence supported relief in the group's favor This evidence, plaintiffs asserted, revealed that Deere did turn over all relevant decisionmaking power to Fidelity and allowed Fidelity to decide such critical matters as what funds to include in the Plans, how much to pay Fidelity Trust (as Trustee), what administrative fees were being assessed against the Plans or charged to participants, and how to allocate the float from interest on Plan assets The district court denied the motion, finding that it was really an untimely request to amend the Complaint, that plaintiffs had not proffered an amended complaint, and that they had not shown how the new evidence altered any of the court's legal conclusions

At the outset, it is not even clear that the proffered evidence is new Fidelity argues that it is not, because plaintiffs possessed the evidence before the district court ruled on the motion to dismiss Plaintiffs concede that point, but they assert that it is "new" in the sense that they received it only after the due date for briefs on the motion That may be so, but if this evidence was so important to their case, plaintiffs should have alerted the district court to their discovery and asked for some appropriate way to bring it to the court's attention There was no reason to sit on potentially relevant evidence and allow the court to go forward with its decision, and then turn around and criticize the court for ruling without the benefit of that same evidence

That is why this court has held that the assessment of newness turns on the date of the court's

dispositive order, not on the date when the motions or briefs are filed *In re Prince*, 85 F 3d 314, 324 (7th Cir 1996) Plaintiffs admit that their experts analyzed the evidence, and the expert reports were exchanged on June 6, 2007, the district court did not rule until June 21, 2007

Plaintiffs also argue that the district court should not have penalized them for failing to proffer an amended complaint, on the theory that a plaintiff can amend a complaint only after the court grants the Rule 59(e) motion The last point may be true, but it does not address the question whether plaintiffs must *show* the district court what they propose to do Once judgment has been entered. there is a presumption that the case is finished, and the burden is on the party who wants to upset that judgment to show the court that there is good reason to set it aside Thus, in *Twohy v First Nat'l Bank*, 758 F 2d 1185 (7th Cir 1985), this court upheld the rejection of a Rule 59(e) motion because the plaintiff did not attach an amended complaint and did not indicate the "exact nature of the amendments proposed" *Id* at 1189; see also *Vicom, Inc. v Harbridge Merchant Servs* , 20 F.3d 771, 785 (7th Cir.1994) (faulting plaintiff for not attaching a proposed complaint or specifically informing the court how it would cure deficiencies in the earlier complaint) We see no abuse of discretion in this aspect of the district court's decision

Finally, the new evidence would not have changed the case against Deere, as the district court observed The court had already approached the case on the assumption that Deere had been imprudent in its selection of investment options. Although the new evidence can be read to disclaim the admission that

Deere had the final word on those selections and to give notice that the plaintiffs' theory was that Fidelity was the true actor (and thus the functional fiduciary), the district court was within its discretion to reject this late shift in focus – a shift that would have been highly prejudicial to the defendants

5. Costs Award

We can be brief with respect to the costs order The district court awarded costs to both Deere and Fidelity, and plaintiffs challenge both awards. First, we address Deere's costs Deere requested $74,335 52 in costs, and the court awarded it $54,396 57. Plaintiffs quibble about such matters as the number of copies the district court thought reimbursable and the documentation for those copies, but we see no abuse of discretion in the district court's evaluation of those matters The only potential problem lies with the copies that Deere admits were made for its own records We have held that the cost of copies made by an attorney for his or her own records is not recoverable *McIlveen v Stone Container Corp.*, 910 F.2d 1581, 1584 (7th Cir 1990). On the other hand, we have also upheld a cost award to a party for copies made "for its attorneys." *Northbrook Excess & Surplus Ins Co v Procter & Gamble Co* , 924 F 2d 633, 643 (7th Cir.1991) This is not an argument, however, that plaintiffs have made, and we are reluctant in the face of apparently conflicting decisions from this court to reach out and decide it on our own Because of the plaintiffs' forfeiture of this potential legal argument and the lack of merit in plaintiffs' other challenges to the Deere costs order, we affirm that order (We take no position on the issue we have flagged; there will be time enough in a case in which it is properly presented to resolve it)

Fidelity asked for $186,488 95 in costs, and the court awarded it $164,814 43. While this is a substantial amount, we see no abuse of discretion in the district court's decision. Plaintiffs' principal complaint is that it was improper to award Fidelity its costs for document selection, as opposed to document processing Fidelity responds that the costs were for converting computer data into a readable format in response to plaintiffs' discovery requests, such costs are recoverable under 28 U S C § 1920 The record supports Fidelity's characterization of the costs, and so we will not disturb the district court's order

The judgment of the district court is AFFIRMED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

No 06 C 719 S

DENNIS HECKER, JONNA DUANE AND JANICE RIGGINS, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,
Plaintiffs,

v

DEERE & COMPANY, FIDELITY MANAGEMENT TRUST COMPANY, AND FIDELITY MANAGEMENT & RESEARCH COMPANY,
Defendants.

June 21, 2007

MEMORANDUM AND ORDER

SHABAZ, District Judge

Plaintiffs Dennis Hecker, Jonna Duane and Janice Riggins commenced this class action alleging that defendant's Deere & Company, Fidelity Management Trust Company (Fidelity Trust), and Fidelity Management and Research Company (Fidelity Research) breached their fiduciary duties under the Employee Retirement and Income Security Act (ERISA) in the payment and non-disclosure of certain fees paid for the management of employee retirement funds The Court has jurisdiction pursuant to 28 U S.C. § 1331. The matter is presently before the Court on defendants' motions to dismiss plaintiffs' second amended complaint The following is a summary of relevant

facts as alleged or referenced in the second amended complaint.

FACTS

Defendant Deere, a heavy equipment manufacturer, sponsors personal savings plans (401(k) plans) for its employees Defendant is also the administrator of the 401(k) plans Pursuant to the 401(k) plans employees may contribute part of their pre-tax earnings to the plan and defendant Deere will match the contributions up to a certain percentage. The funds are invested in various investment options presented by the plan and chosen by the employee More than $2 5 billion is invested by employees in the Deere 401(k) plans. Plaintiffs are participants in the 401(k) plans

In 1990 defendants Deere and Fidelity Trust entered into an agreement in which Fidelity Trust agreed to act a trustee for the 401(k) plans, to perform record keeping and other administrative tasks for the plans As plan administrator Deere has final authority to select investment options for the plans. Deere's role in selecting funds is described in the relevant Summary Plan Descriptions (SPDs) as follows

Who are the plan administrators and what functions do they perform?

> The authority to control and manage the operation and manage the operation and administration of the Plan is vested in [Deere] As administrator of the Plan, [Deere] has, among other powers, the right to (vi) maintain records concerning the Plan and make arrangements with the trustee to maintain accounts and proper statements.

All contributions to the Plan are held by the trustee, [Fidelity Trust], acting under a trust agreement dated December 1, 1990. The Trustee's primary responsibilities are to (i) hold and invest the Plan assets in trust among several investment options selected by [Deere] and as directed by Plan participants and (ii) perform certain ministerial record-keeping functions.

What fees and charges may participants in the Plan be subject to?

The costs of administering the Plan are paid by the Company. Participants incur no transaction fees or sales loads on funds purchased and sold through the Plan's standard plan options .... All fund investors indirectly pay any fund-level expenses, such as management fees, asset-based sales charges (12b-1 fees), and other fund expenses, as detailed in the fund's prospectus .

Deere agreed with Fidelity Trust that Deere would limit its selection of investment options to investment funds offered by defendant Fidelity Research for which Fidelity Research was investment advisor ("Fidelity Funds"). Fidelity Funds are marketed to investors throughout the United States through various commercial outlets Presently, 23 of the 26 investment options available to the 401(k) plan participants are Fidelity Funds Fidelity Trust and Fidelity Research are both subsidiaries of Fidelity Investments

Defendant Fidelity Trust is compensated in part for its duties as trustee by direct payment from defendant Deere. Government filings made on behalf of

the plans represent that the Plans themselves make no direct payment to defendant Fidelity Trust

Each of the funds for which defendant Fidelity Research is investment advisor charge fund investors an asset-based fee The fee, expressed as a percentage of total dollars invested in a particular fund, varies from fund to fund Of the 20 primary options offered, fees range from 07% for the Spartan Fund (which replicates the S & P 500) to 1.01% for the Diversified International Fund The total fee, expressed as a percentage of assets invested, is set forth in each fund prospectus, further itemized between management fee, service fee and other expenses. Additionally, the plans offer an investment alternative called BrokerageLink which permit participants to invest in over 2500 different publicly available mutual funds from Fidelity and broker mutual fund companies.

As the total amount of money invested in the funds grows, the fees grow Fidelity Research shares some of the fee revenue it receives with Fidelity Management The fact and the amount of this revenue sharing of asset-based revenue is not known to defendant Deere or disclosed to plan participants The Fidelity Funds available in the plan are the same funds, and charge the same asset-based fees, as those made available to large and small investors in the retail market for investment funds Defendant Deere could have negotiated lower fees with Fidelity Research, or could have selected different funds from different providers with lower rates but has made no effort to do so

MEMORANDUM

The second amended complaint, distilled to the actual causes of action, alleges that the defendants violated their fiduciary duties to plan participants in two ways by providing investment options with excessive and unreasonable fees and costs, and by failing to adequately disclose information about the fees and costs to plan participants Defendant Deere moves to dismiss the complaint on the basis that its disclosures were fully compliant with ERISA requirements and that any claim based on the amount of the total fees is foreclosed by ERISA's safe harbor provision, 29 U.S C. § 1104(c) Defendant Fidelity Trust moves to dismiss the claims against it on the basis that the claims do not relate to its limited fiduciary role and defendant Fidelity Research contends that it is not a fiduciary.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief *Conley v Gibson*, 355 U S 41, 45-46, 78 S Ct 99, 2 L.Ed 2d 80 (1957) In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory " *Car Carriers, Inc v Ford Motor Co.*, 745 F 2d 1101, 1106 (7th Cir 1984)

Initially, plaintiffs oppose the motions to dismiss on the grounds that they are based in part on Summary Plan Descriptions (SPDs) and prospectuses which are not attached to the complaint and therefore not properly considered on a motion to dismiss. Documents not attached to the complaint may be considered if they are referred to in the compliant,

are concededly authentic and are central to the plaintiff's claim *Tierney v Vahle*, 304 F 3d 734, 738 (7th Cir.2002) The point of the exception is to limit a plaintiff's ability to evade dismissal by failing to attach an important document that proves plaintiff's claims lack merit *Id* Both the exception and its purpose are applicable here The complaint is based on the terms of the plans and the alleged inadequacy of disclosures to participants. Accordingly, the plan documents, the SPDs, and the prospectuses which are referenced in the SPDs are central to the claim and form the basis for the complaint The prospectuses, in addition to being fundamental to the complaint are widely circulated publicly available documents There is no dispute concerning the authenticity of any of them.

Although many of the allegations are derived from the documents, they have not been attached to the complaint in an apparent effort to evade assessment of the legal merits of the claims on a motion to dismiss Far from a short and plain statement of claims as contemplated by Rule 8, the complaint is a rambling 38 page collection long on legal argument, public policy rhetoric and repetition, but vague in its allegations of facts which might be relevant to the claims alleged. Under the circumstances it is appropriate to consider them as part of the complaint on a motion to dismiss

Adequacy of Disclosure

Defendant Deere moves to dismiss the claims contending that the allegations and plan documents establish as a matter of law that it has fully complied with the applicable ERISA disclosure provisions Plaintiffs dispute compliance and further argue that

additional disclosure is required based on Deere's general fiduciary obligations

The following provisions of title 29 of the United States Code are relevant.

§ 1021(a) Summary plan description and information to be furnished to participants and beneficiaries

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan –

(1) a summary plan description described in section 1022(a)(1) of this title, and

(2) The information described in sections 1024(b)(3) and 1025(a) and (c) of this title

§ 1023(b) Financial statement

An annual report under this section shall include a financial statement containing the following information

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application

§ 1024(b) Publication of Summary Plan Description and annual report to participants and beneficiaries of plan

> Publication of the summary plan description and annual reports shall be made to participants and beneficiaries of the particular plan . [w]ithin 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules described in [§ 1023(b)] . . .

29 C.F R § 2520 104b-10(d)(3) prescribes the form of the annual report relevant to expenses as follows

> Plan expenses were ($) These expenses included ($) in administrative expenses and ($) in benefits paid to participants and beneficiaries, and ($) in other expenses

The second amended complaint alleges that defendants failed to disclose the fact that Fidelity Research shared part of the fees it received with its corporate sibling, Fidelity Trust Nothing in the statute or regulation directly requires such a disclosure. Plaintiffs contend that failure to disclose the transfer renders the existing disclosures inaccurate because a portion of the expenses reported as incurred for fund management was actually used for trustee administrative expenses The statute and regulations cannot be reasonably read to require this type of disclosure for several reasons, particularly under the circumstances here

The disclosure in the reports and prospectuses accurately reflect the expenses actually paid to the fund manager for fund management as evidenced by the allegations that the same fees are charged to all

retail fund customers To the extent that the charge includes profit, it is unlikely that the fund sponsor would know or be in a position to control its redistribution among related corporations, a fact conceded in defendants' brief There is no evidence of intent in the statute or regulations to reach this type of detail. Moreover, recent proposals to amend the regulations, *see* 71 Fed Reg 41,392, 41,394, to require revenue sharing disclosures in annual reports make it apparent that present regulations do not require it These proposals for regulatory change originated in the ERISA Advisory Counsel *Report of the Working Group on Plan Fees and Reporting on Form 5500*, http //www.dol gov/ebsa/publications/AC_111804_ report html, a document relied upon by both parties

The report examines the nature of the revenue sharing and its effect on the adequacy of expense disclosure for 401(k) plans as presently required by ERISA regulations:

> Currently the Form 5500 fee reporting requirements do not meet the Department of Labor's objectives with regard to the data collected There are numerous pooled investment vehicles in which the fees are intrinsic to the underlying investment and are not reported to (or known by) the plan sponsor nor reported on Form 5500 Additionally, fees paid to plan service providers such as record keepers and trustees out of these asset-based fees, in the form of revenue sharing, sub-transfer agency fees, 12(b)(1) fees or the like are not reported on Form 5500 or the accompanying Schedules While some more sophisticated plan sponsors are cognizant of the overall fees, both explicit and embedded, as well as the revenue sharing arrangements between various providers, many plan sponsors

simply do not understand the total fees paid to service providers, nor the revenue streams between them The fiduciary responsibility provisions of ERISA require that plan sponsors know the amount of fees paid in relationship to the services provided and to understand the revenue sharing arrangements between plan providers. Therefore, the Department of Labor should consider amending the Form 5500 and the accompanying Schedules and, through its rule-making authority, solicit the input from the industry as to the appropriate methodology for capturing that information In particular, the Department of Labor may wish to consider use of a proxy in order to estimate total fees in light of the significant difficulties of capturing exact information at the plan level The Department of Labor may also wish to modify its existing worksheet for plan sponsors in order to provide a tool to help plan sponsors understand the true nature of the non-explicit fees and revenue sharing arrangements among the plan's providers prior to choosing the provider or an investment option.

Executive Summary at pp 3-4

A review of the report confirms that the revenue sharing issue raised by plaintiffs' complaint is a matter of policy concern within the Department of Labor. It also unequivocally confirms that present regulations do not require disclosure of the information *See* particularly the report's Recommendations for Regulatory Change at p 8 Whether, as a policy matter, additional reporting of revenue sharing arrangements should be required, it is not presently required and failure to include such information does not violate existing ERISA standards for disclosure.

Accordingly, defendants' failure to so disclose is not a violation of the present statute or regulations and does not state a claim for breach of the duty of disclosure

There is no merit to plaintiffs' contention that disclosure not required by the statutory disclosure requirements is separately required by the general ERISA fiduciary obligations Disclosure requirements are generally limited to those expressly prescribed by the statutory language of ERISA. *Ames v American Nat. Can Co* , 170 F.3d 751, 759 (7th Cir 1999). Even the case relied upon by plaintiffs, *Jordan v. Federal Express Corp.*, 116 F 3d 1005 (3d Cir.1997), confirms that while Courts have latitude to develop the meaning of general fiduciary duties, that latitude is limited as applied to disclosure obligations "Because the statutory disclosure and reporting requirements and remedies were carefully considered and described by Congress, we required a showing of 'extraordinary circumstances' for a participant to receive an equitable remedy under § 502(a)(3) " *Id.* at 1013 Where as here Congress has by statute and related regulation, created detailed rules governing disclosure requirements, it would be inappropriate to ignore and augment them using the general power to define fiduciary obligations

The second amended complaint does not state a claim based on the failure to comply with ERISA's disclosure requirements.

Failure to Provide Lower Fee Investment Choices

The second amended complaint also alleges that defendants breached their fiduciary obligations by selecting and offering investment options with unreasonably high fees for the 401(k) plans. ERISA requires that a fiduciary must discharge its duties with

the care, skill, prudence and diligence of a prudent man. 29 U S C § 1104(a)(1)(B). It also provides a "safe harbor" from liability for breaches of fiduciary duties under limited circumstances in 29 U S C § 1104(c)·

> (1) In the case of a pension plan which provides for individual accounts and permits a participant of beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)
>
> (B) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control

Defendants move to dismiss the claim on the basis that the safe harbor applies Initially, plaintiffs oppose the motion on the basis that consideration of the defense is inappropriate on a motion to dismiss Alternatively, plaintiffs contend that the safe harbor is unavailable because defendants have not complied with the regulatory disclosure requirements and, more fundamentally, because plaintiffs alleged losses do not stem from any exercise of control by them

Although plaintiffs did so in the second amended complaint, they were under no obligation to allege facts which would overcome an anticipated affirmative defense *U.S Gypsum Co v Indiana Gas Co , Inc* , 350 F 3d 623, 626 (7th Cir.2003) However, a motion to dismiss may be based on a defense provided that the allegations of the complaint (and as discussed above, documents deemed to be part of the complaint) establish all the ingredients of the defense. *Id* Accordingly, defendants may prevail on the motion to dismiss based on the 29 U S C § 1104(c)

safe harbor, but only if the facts of the complaint establish all the elements of the defense

In order to qualify for safe harbor treatment defendants must have complied with the requirements of 29 C F R § 2550.404c-1. There is no dispute that the facts alleged establish all criteria except for the following provisions relating to expense disclosure:

> (v) A description of any transaction fees and expenses which affect the participant's or beneficiary's account balance in connection with purchases or sales of interests in investment alternatives (e g., commissions, sales load, deferred sales charges, redemption or exchange fees);
>
> (i) A description of the annual operating expenses of each designated investment alternative (e g , investment management fees, administrative fees, transaction costs) which reduce the rate of return to participants and beneficiaries, and the aggregate amount of such expenses expressed as a percentage of average net assets of the designated investment alternative,

29 C F.R § 2550 404c-1(b)(2)(B)(1)(v), (2)(i).

On their face it appears that the disclosures provide precisely this information Plaintiffs argue that the disclosures of the SPDs and prospectuses do not satisfy the requirements because they do not include such information as whether revenue sharing has occurred and do not include sufficiently detailed breakdown of other expenses not specifically required by the regulations. Plaintiffs suggest that the failure to provide this information prevents informed investment comparison This argument suffers from the same flaw as the argument that revenue sharing

information was required by ERISA disclosure provisions The allegedly omitted disclosures are not required by the language of the regulations and would instead require judicial expansion of the detailed disclosure regime crafted by Congress and the Department of Labor pursuant to its statutory authority

Furthermore, there is nothing to suggest that receiving this additional non-prescribed information would effectively enhance investment decisions In assessing the likely return on an investment the fees netted against the return are certainly relevant, but knowing the subsequent distribution of those fees has no impact on the investment's value *See In re Merrill Lynch Investment Management Funds Securities Litigation*, 434 F Supp 2d 233, 238 (S D N Y 2006) (holding that such information is not material under securities law) In the context of the disclosure of information on investment options the additional information suggested by plaintiffs including revenue sharing is neither required by the regulations nor material to participant investors assessing the investment opportunity

Even had defendants complied with the regulatory prerequisites for safe harbor status, defendants avoid liability for a breach of fiduciary duty only if plaintiff's loss, here the payment of excessive fees, resulted from the participants' exercise of control over the investments Stated differently, the safe harbor acts as a defense only if participants could have avoided the losses by making investment choices available to them *Langbecker v. Electronic Data Systems Corp* , 476 F 3d 299, 312 (5th Cir.2007)

> A plan fiduciary may have violated the duties of selection and monitoring of a plan investment, but § 404(c) recognizes that participants are not

> hapless victims of every error Participants have access to information about the Plan's investments, pursuant to DOL regulations, and they are furnished with risk-diversified investment options
>
> *Id*

Plaintiffs allege that defendants breached their fiduciary duties in this case by failing to properly evaluate the expense ratios applicable to the plan investment options and provide less expensive options so participants paid greater expenses than necessary, resulting in investment losses. When participants made their investment decisions they had access to the expense ratio for each investment fund and could take those expenses into consideration Plaintiffs maintain that this exercise of control was illusory, because every investment option was burdened with excessive expenses and therefore participants were powerless to avoid them. However, the only inference available given the factual allegations is that participants were in a position to exercise control over expenses.

Participants could choose to invest in twenty primary mutual funds and more than 2500 others through BrokerageLink. All of these funds were also offered to investors in the general public so expense ratios were necessarily set to attract investors in the marketplace The expense ratios among the twenty primary funds ranges from just over 1% to as low as 07% Unquestionably, participants were in a position to consider and adjust their investment strategy based in part on the relative cost of investing in these funds It is untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios. The only possible conclusion is that to the extent participants incurred exces-

sive expenses, those losses were the result of participants exercising control over their investments within the meaning of the safe harbor provision

Assuming for purposes of the present motion that defendants failed to satisfy their fiduciary obligation to consider expenses when selecting mutual fund investment options, they are nevertheless insulated from liability by the safe harbor provision because of the nature and breadth of funds made available to participants under the plans

Fidelity Defendants

It follows from the conclusion that no claim has been alleged for breach of fiduciary duty either for failure to disclose information about the plan or for selecting investment alternatives, that no liability can exist against the Fidelity defendants. It should also be noted that were disclosures non-compliant or the safe harbor rule inapplicable, neither of the Fidelity defendants could be liable because neither had fiduciary responsibility for making plan disclosures or selecting plan investments

The trust agreements governing the obligations of the parties, as reflected directly in the allegations of the second amended complaint, unequivocally provide that defendant Deere has sole responsibility for selection of plan investment options ERISA provides that a person is a fiduciary only *to the extent that* it has authority or exercises discretionary control over an aspect of the plan 29 U S.C § 1002(21)(A); *Chicago Dist. Council of Carpenters Welfare Fund v Caremark, Inc* , 474 F 3d 463, 471-72 (7th Cir.2007) Had the Fidelity defendants been fiduciaries for some purposes, they were not fiduciaries for the purposes of making plan investment deci-

sions and accordingly could not be liable for breach of fiduciary duty on the claims

ORDER

IT IS ORDERED that defendants' motion to dismiss is GRANTED

IT IS FURTHER ORDERED that judgment be entered dismissing plaintiffs' complaint with prejudice and costs.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos 07-3605 & 08-1224

DENNIS HECKER, ET AL ,
Plaintiffs-Appellants,

v

DEERE & COMPANY, FIDELITY MANAGEMENT TRUST CO.,
AND FIDELITY MANAGEMENT & RESEARCH CO ,
Defendants-Appellees

June 24, 2009

Before DANIEL A MANION, Circuit Judge. DIANE P WOOD, Circuit Judge, and JOHN DANIEL TINDER, Circuit Judge

ORDER

Appellants filed their Petition for Panel Rehearing and Petition for Rehearing En Banc on March 9, 2009 Appellee Deere & Company and Appellees Fidelity Management Trust Company and Fidelity Management & Research Company filed their Answers to the Petition on April 6, 2009 In addition, three *amicus curiae* briefs in support of rehearing or rehearing *en banc* were filed in conjunction with the Petition: one from the Secretary of Labor (filed March 20, 2009), one from the AARP and other groups (filed March 18, 2009), and one from a group

of law professors (filed March 20, 2009) No judge[1] asked for a vote on the petition for rehearing *en banc*, and all members of the panel have voted to deny the petition for rehearing, with the following addition to the original opinion, *Hecker v Deere & Co.*, 556 F 3d 575 (7th Cir.2009):

The Secretary of Labor has made a number of points in her *amicus* brief that deserve a brief response First, she argues that the panel has erred by failing to give appropriate deference to her interpretation of the regulation implementing 29 U S C § 1104(d), 29 C F R § 2550 404c-1. But, as the Secretary herself acknowledges, the panel did not ignore any language in the regulation proper Instead, it did not give the weight that the Secretary believes is due to some language in a footnote to the preamble to the regulation (We are speaking here of the version of the regulation that was in force at the time relevant to this suit; it should go without saying that the Secretary is free to propose and enact new regulations addressed more specifically to the way in which choice of investment options in a plan relates to the safe harbor provision, if she believes that this would be appropriate) In her brief, the Secretary explains that she presently "interprets her regulation to mean that, even if the plan otherwise qualifies as a section 404(c) plan, the fiduciary is not relieved by 404(c) from liability for plan losses resulting from the imprudent selection and monitoring of an investment option offered by the plan . " As support for that statement, she cites 56 Fed Reg 10724, 10732 n 21 (Mar 13,1991), DOL Opinion Letter No 98-04A, 1998 WL 326300 at *3 n 1 (May 28,1998), DOL

[1] Judge Joel M Flaum and Judge Ilana Diamond Rovner took no part in the consideration of this matter

Information Letter to Douglas O Kant, 1997 WL 1824017 at *2 (Nov. 26, 1997) (Kant Letter) This is enough, she asserts, to make that proposition a rule, entitled to deference under *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 U S 837, 842-43, 104 S.Ct. 2778, 81 L Ed 2d 694 (1984), rather than a more informal statement of administrative practice, entitled only to respect under the standards of *United States v. Mead Corp*, 533 U S 218, 229-30, 121 S Ct. 2164, 150 L Ed.2d 292 (2001), which in turn relies on *Skidmore v Swift & Co*, 323 U S 134, 65 S.Ct. 161, 89 L.Ed 124 (1944)

With respect, we cannot agree with the Secretary that the footnote in the preamble is entitled to full *Chevron* deference The panel did defer to the Secretary's concerns, to the extent that it refrained from making any definitive pronouncement on "whether the safe harbor applies to the selection of investment options for a plan." *Hecker*, 556 F 3d at 589. Instead, as we explain further in this order, we left this area open for future development, whether on the basis of a different set of pleadings, or on the basis of a regulation directed to this issue The Secretary admits that the panel's primary holding – that there was no duty to scour the market to find the fund with the lowest imaginable fees, and that the fees themselves in the Funds identified in the complaint could not be deemed imprudent because they were offered at the same prices to the general public – does not call into question the validity of even the preamble to the Secretary's regulation, much less the regulation taken as a whole Thus, her real quibble is with the panel's alternate holding that the complaint the court was evaluating contained enough information to warrant the conclusion that Deere was entitled to the safe

harbor defense In our view, the Secretary's concern is more hypothetical than real She fears that some case in the future may arise in which a Plan fiduciary acts imprudently by selecting an overpriced portfolio of funds, and that this opinion will somehow immunize the fiduciary from accountability for that decision

The panel's opinion, however, stands for no such broad proposition It was limited to the complaint before the court, as supplemented by the materials the panel found were properly before the district court Applying the pleading standards enunciated in *Bell Atlantic Corp v Twombly*, 550 U S 544, 127 S Ct. 1955, 167 L Ed 2d 929 (2007), we concluded that these plaintiffs failed to state a claim for the kind of fiduciary misfeasance the Secretary describes At the time we wrote, the Court had not yet handed down *Ashcroft v Iqbal*, --- U S ----, 129 S.Ct 1937, 173 L Ed 2d 868 (2009) *Iqbal* reinforces *Twombly's* message that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id* at 1949. The Court explained further that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief' Fed. Rule Civ Proc. 8(a)(2)." *Id.* at 1950

The Secretary also fears that our opinion could be read as a sweeping statement that any Plan fiduciary can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among

them She is right to criticize such a strategy It could result in the inclusion of many investment alternatives that a responsible fiduciary should exclude It also would place an unreasonable burden on unsophisticated plan participants who do not have the resources to pre-screen investment alternatives. The panel's opinion, however, was not intended to give a green light to such "obvious, even reckless, imprudence in the selection of investments" (as the Secretary puts it in her brief) Instead, the opinion was tethered closely to the facts before the court Plaintiffs never alleged that any of the 26 investment alternatives that Deere made available to its 401(k) participants was unsound or reckless, nor did they attack the BrokerageLink facility on that theory They argued – and especially in their Petition for Rehearing they continue to argue – that the Plans were flawed because Deere decided to accept "retail" fees and did not negotiate presumptively lower "wholesale" fees The opinion discusses a number of reasons why that particular assertion is not enough, in the context of these Plans, to state a claim, and we adhere to that discussion

We add another point that was raised earlier but that we did not mention in the opinion· the complaint is silent about the services that Deere participants received from the company sponsored plans It would be one thing if they were treated exactly like all other retail market purchasers of Fidelity mutual fund shares, it would be quite another if, for example, they received extra investment advice from someone dedicated to the Deere accounts, or if they received other extra services. If the Deere participants received more for the same amount of money, then their effective cost of participation may in fact

have approached wholesale levels. We return, therefore, to the general point made in the opinion *this* complaint, alleging that Deere chose *this* package of funds to offer for its 401(k) Plan participants, with this much variety and this much variation in associated fees, failed to state a claim upon which relief can be granted.

We therefore DENY the Petition for Rehearing and Petition for Rehearing *En Banc*

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974, § 404, 29 U S C § 1104, provides.

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of

(i) providing benefits to participants and their beneficiaries, and

(ii) defraying reasonable expenses of administering the plan,

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the

diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title)

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of –

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon –

(A) the earlier of –

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity, or

(ii) one year after the transfer is made, or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which –

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if –

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1)

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designat-

ing default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary –

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement –

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement –

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan

(2) For purposes of this subsection –

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990

29 C F R § 2550 404c-1 provides

§ 2550.404c-1. ERISA section 404(c) plans.

(a) *In general* (1) Section 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) provides that if a pension plan that provides for individual accounts permits a participant or beneficiary to exercise control over assets in his account and that participant or beneficiary in fact exercises control over assets in his account, then the participant or beneficiary shall not be deemed to be a fiduciary by reason of his exercise of control and no person who is otherwise a fiduciary shall be liable for any loss, or by reason of any breach, which results from such exercise of control. This section describes the kinds of plans that are "ERISA section 404(c) plans," the circumstances in which a participant or beneficiary is considered to have exercised independent control over the assets in his account as contemplated by section 404(c), and the consequences of a participant's or beneficiary's exercise of control.

(2) The standards set forth in this section are applicable solely for the purpose of determining whether a plan is an ERISA section 404(c) plan and whether a particular transaction engaged in by a participant or beneficiary of such plan is afforded relief by section 404(c) Such standards, therefore, are not intended to be applied in determining whether, or to what extent, a plan which does not meet the requirements for an ERISA section 404(c) plan or a fiduciary with respect to such a plan satisfies the fiduciary responsibility or other provisions of title I of the Act.

(b) *ERISA section 404(c) plans* – (1) *In general.* An "ERISA section 404(c) Plan" is an individual account plan described in section 3(34) of the Act that

(i) Provides an opportunity for a participant or beneficiary to exercise control over assets in his individual account (see paragraph (b)(2) of this section), and

(ii) Provides a participant or beneficiary an opportunity to choose, from a broad range of investment alternatives, the manner in which some or all of the assets in his account are invested (see paragraph (b)(3) of this section)

(2) *Opportunity to exercise control* (i) a plan provides a participant or beneficiary an opportunity to exercise control over assets in his account only if

(A) Under the terms of the plan, the participant or beneficiary has a reasonable opportunity to give investment instructions (in writing or otherwise, with opportunity to obtain written confirmation of such instructions) to an identified plan fiduciary who is obligated to comply with such instructions except as otherwise provided in paragraph (b)(2)(ii)(B) and (d)(2)(ii) of this section, and

(B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments For purposes of this subparagraph, a participant or beneficiary will not be considered to have sufficient investment information unless –

(*1*) The participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf).

(*i*) An explanation that the plan is intended to constitute a plan described in section 404(c) of the Employee Retirement Income Security Act, and title 29 of the Code of Federal Regulations, § 2550 440c-1, and that the fiduciaries of the plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participant or beneficiary;

(*ii*) A description of the investment alternatives available under the plan and, with respect to each designated investment alternative, a general description of the investment objectives and risk and return characteristics of each such alternative, including information relating to the type and diversification of assets comprising the portfolio of the designed investment alternative;

(*iii*) Identification of any designated investment managers;

(*iv*) An explanation of the circumstances under which participants and beneficiaries may give investment instructions and explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfer to or from a designated investment alternative, and any restrictions on the exercise of voting, tender and similar rights appurtenant to a participant's or beneficiary's investment in an investment alternative;

(*v*) A description of any transaction fees and expenses which affect the participant's or beneficiary's account balance in connection with purchases or sales of interests in investment alternatives (e.g., commissions, sales load, deferred sales charges, redemption or exchange fees);

(*vi*) The name, address, and phone number of the plan fiduciary (and, if applicable, the person or persons designated by the plan fiduciary to act on his behalf) responsible for providing the information described in paragraph (b)(2)(i)(B)(*2*) upon request of a participant or beneficiary and a description of the information described in paragraph (b)(2)(i)(B)(*2*) which may be obtained on request,

(*vii*) In the case of plans which offer an investment alternative which is designed to permit a participant or beneficiary to directly or indirectly acquire or sell any employer security (employer security alternative), a description of the procedures established to provide for the confidentiality of information relating to the purchase, holding and sale of employer securities, and the exercise of voting, tender and similar rights, by participants and beneficiaries, and the name, address and phone number of the plan fiduciary responsible for monitoring compliance with the procedures (see paragraphs (d)(2)(ii)(E)(*4*)(*vii*), (*viii*) and (*ix*) of this section), and

(*viii*) In the case of an investment alternative which is subject to the Securities Act of 1933, and in which the participant or beneficiary has no assets invested, immediately following the participant's or beneficiary's initial investment, a copy of the most recent prospectus provided to the plan This condition will be deemed satisfied if the participant or beneficiary has been provided with a copy of such most recent prospectus immediately prior to the participant's or beneficiary's initial investment in such alternative,

(*ix*) Subsequent to an investment in a investment alternative, any materials provided to the plan relating to the exercise of voting, tender or similar rights

which are incidental to the holding in the account of the participant or beneficiary of an ownership interest in such alternative to the extent that such rights are passed through to participants and beneficiaries under the terms of the plan, as well as a description of or reference to plan provisions relating to the exercise of voting, tender or similar rights

(2) The participants or beneficiary is provided by the identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf), either directly or upon request, the following information, which shall be based on the latest information available to the plan

(*i*) A description of the annual operating expenses of each designated investment alternative (e g , investment management fees, administrative fees, transaction costs) which reduce the rate of return to participants and beneficiaries, and the aggregate amount of such expenses expressed as a percentage of average net assets of the designated investment alternative,

(*ii*) Copies of any prospectuses, financial statements and reports, and of any other materials relating to the investment alternatives available under the plan, to the extent such information is provided to the plan,

(*iii*) A list of the assets comprising the portfolio of each designated investment alternative which constitute plan assets within the meaning of 29 CFR 2510.3-101, the value of each such asset (or the proportion of the investment alternative which it comprises), and, with respect to each such asset which is a fixed rate investment contract issued by a bank, savings and loan association or insurance company, the name of the issuer of the contract, the term of the contract and the rate of return on the contract;

(*iv*) Information concerning the value of shares or units in designated investment alternatives available to participants and beneficiaries under the plan, as well as the past and current investment performance of such alternatives, determined, net of expenses, on a reasonable and consistent basis; and

(*v*) Information concerning the value of shares or units in designated investment alternatives held in the account of the participant or beneficiary

(ii) A plan does not fail to provide an opportunity for a participant or beneficiary to exercise control over his individual account merely because it –

(A) *Imposes charges for reasonable expenses.* A plan may charge participants' and beneficiaries' accounts for the reasonable expenses of carrying out investment instructions, provided that procedures are established under the plan to periodically inform such participants and beneficiaries of actual expenses incurred with respect to their respective individual accounts,

(B) *Permits a fiduciary to decline to implement investment instructions by participants and beneficiaries* A fiduciary may decline to implement participant and beneficiary instructions which are described at paragraph (d)(2)(ii) of this section, as well as instructions specified in the plan, including instructions –

(*1*) Which would result in a prohibited transaction described in ERISA section 406 or section 4975 of the Internal Revenue Code, and

(*2*) Which would generate income that would be taxable to the plan;

(C) *Imposes reasonable restrictions on frequency of investment instructions* A plan may impose rea-

sonable restrictions on the frequency with which participants and beneficiaries may give investment instructions In no event, however, is such a restriction reasonable unless, with respect to each investment alternative made available by the plan, it permits participants and beneficiaries to give investment instructions with a frequency which is appropriate in light of the market volatility to which the investment alternative may reasonably be expected to be subject, provided that –

(*1*) At least three of the investment alternatives made available pursuant to the requirements of paragraph (b)(3)(i)(B) of this section, which constitute a broad range of investment alternatives, permit participants and beneficiaries to give investment instructions no less frequently than once within any three month period, and

(*2*)(*i*) At least one of the investment alternatives meeting the requirements of paragraph (b)(2)(ii)(C)(*1*) of this section permits participants and beneficiaries to give investment instructions with regard to transfers into the investment alternative as frequently as participants and beneficiaries are permitted to give investment instructions with respect to any investment alternative made available by the plan which permits participants and beneficiaries to give investment instructions more frequently than once within any three month period, or

(*ii*) With respect to each investment alternative which permits participants and beneficiaries to give investment instructions more frequently than once within any three month period, participants and beneficiaries are permitted to direct their investments from such alternative into an income producing, low risk, liquid fund, subfund, or account as

frequently as they are permitted to give investment instructions with respect to each such alternative and, with respect to such fund, subfund or account, participants and beneficiaries are permitted to direct investments from the fund, subfund or account to an investment alternative meeting the requirements of paragraph (b)(2)(ii)(C)(*1*) as frequently as they are permitted to give investment instructions with respect to that investment alternative, and

(*3*) With respect to transfers from an investment alternative which is designed to permit a participant or beneficiary to directly or indirectly acquire or sell any employer security (employer security alternative) either.

(*i*) All of the investment alternatives meeting the requirements of paragraph (b)(2)(ii)(C)(*1*) of this section must permit participants and beneficiaries to give investment instructions with regard to transfers into each of the investment alternatives as frequently as participants and beneficiaries are permitted to give investment instructions with respect to the employer security alternative, or

(*ii*) Participants and beneficiaries are permitted to direct their investments from each employer security alternative into an income producing, low risk, liquid fund, subfund, or account as frequently as they are permitted to give investment instructions with respect to such employer security alternative and, with respect to such fund, subfund, or account, participants and beneficiaries are permitted to direct investments from the fund, subfund or account to each investment alternative meeting the requirements of paragraph (b)(2)(ii)(C)(*1*) as frequently as they are permitted to give investment instructions with respect to each such investment alternative.

(iii) Paragraph (c) of this section describes the circumstances under which a participant or beneficiary will be considered to have exercised independent control with respect to a particular transaction

(3) *Broad range of investment alternatives.* (i) A plan offers a broad range of investment alternatives only if the available investment alternatives are sufficient to provide the participant or beneficiary with a reasonable opportunity to:

(A) Materially affect the potential return on amounts in his individual account with respect to which he is permitted to exercise control and the degree of risk to which such amounts are subject,

(B) Choose from at least three investment alternatives

(*1*) Each of which is diversified,

(*2*) Each of which has materially different risk and return characteristics,

(*3*) Which in the aggregate enable the participant or beneficiary by choosing among them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary, and

(*4*) Each of which when combined with investments in the other alternatives tends to minimize through diversification the overall risk of a participant's or beneficiary's portfolio,

(C) Diversify the investment of that portion of his individual account with respect to which he is permitted to exercise control so as to minimize the risk of large losses, taking into account the nature of the plan and the size of participants' or beneficiaries' accounts In determining whether a plan provides the participant or beneficiary with a reasonable op-

portunity to diversify his investments, the nature of the investment alternatives offered by the plan and the size of the portion of the individual's account over which he is permitted to exercise control must be considered Where such portion of the account of any participant or beneficiary is so limited in size that the opportunity to invest in look-through investment vehicles is the only prudent means to assure an opportunity to achieve appropriate diversification, a plan may satisfy the requirements of this paragraph only by offering look-through investment vehicles.

(ii) *Diversification and look-through investment vehicles.* Where look-through investment vehicles are available as investment alternatives to participants and beneficiaries, the underlying investments of the look-through investment vehicles shall be considered in determining whether the plan satisfies the requirements of subparagraphs (b)(3)(i)(B) and (b)(3)(i)(C).

(c) *Exercise of control* – (1) *In general* (i) Sections 404(c)(1) and 404(c)(2) of the Act and paragraphs (a) and (d) of this section apply only with respect to a transaction where a participant or beneficiary has exercised independent control in fact with respect to the investment of assets in his individual account under an ERISA section 404(c) plan

(ii) For purposes of sections 404(c)(1) and 404(c)(2) of the Act and paragraphs (a) and (d) of this section, a participant or beneficiary will be deemed to have exercised control with respect to the exercise of voting, tender and similar rights appurtenant to the participant's or beneficiary's ownership interest in an investment alternative, provided that the participant's or beneficiary's investment in the investment alternative was itself the result of an exercise of

control, the participant or beneficiary was provided a reasonable opportunity to give instruction with respect to such incidents of ownership, including the provision of the information described in paragraph (b)(2)(i)(B)(*1*)(*ix*) of this section, and the participant or beneficiary has not failed to exercise control by reason of the circumstances described in paragraph (c)(2) with respect to such incidents of ownership

(2) *Independent control* Whether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case. However, a participant's or beneficiary's exercise of control is not independent in fact if

(i) The participant or beneficiary is subjected to improper influence by a plan fiduciary or the plan sponsor with respect to the transaction;

(ii) A plan fiduciary has concealed material nonpublic facts regarding the investment from the participant or beneficiary, unless the disclosure of such information by the plan fiduciary to the participant or beneficiary would violate any provision of federal law or any provision of state law which is not preempted by the Act, or

(iii) The participant or beneficiary is legally incompetent and the responsible plan fiduciary accepts the instructions of the participant or beneficiary knowing him to be legally incompetent.

(3) *Transactions involving a fiduciary.* In the case of a sale, exchange or leasing of property (other than a transaction described in paragraph (d)(2)(ii)(E) of this section) between an ERISA section 404(c) plan and a plan fiduciary or an affiliate of such a fiduciary, or a loan to a plan fiduciary or an affiliate of

such a fiduciary, the participant or beneficiary will not be deemed to have exercised independent control unless the transaction is fair and reasonable to him. For purposes of this paragraph (c)(3), a transaction will be deemed to be fair and reasonable to a participant or beneficiary if he pays no more than, or receives no less than, adequate consideration (as defined in section 3(18) of the Act) in connection with the transaction

(4) *No obligation to advise.* A fiduciary has no obligation under part 4 of title I of the Act to provide investment advice to a participant or beneficiary under an ERISA section 404(c) plan.

(d) *Effect of independent exercise of control* – (1) *Participant or beneficiary not a fiduciary.* If a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in paragraph (c), then such participant or beneficiary is not a fiduciary of the plan by reason of such exercise of control

(2) *Limitation on liability of plan fiduciaries.* (i) If a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in paragraph (c), then no other person who is a fiduciary with respect to such plan shall be liable for any loss, or with respect to any breach of part 4 of title I of the Act, that is the direct and necessary result of that participant's or beneficiary's exercise of control.

(ii) Paragraph (d)(2)(i) does not apply with respect to any instruction, which if implemented –

(A) Would not be in accordance with the documents and instruments governing the plan insofar as such

documents and instruments are consistent with the provisions of title I of ERISA,

(B) Would cause a fiduciary to maintain the indicia of ownership of any assets of the plan outside the jurisdiction of the district courts of the United States other than as permitted by section 404(b) of the Act and 29 CFR 2550 404b-1,

(C) Would jeopardize the plan's tax qualified status under the Internal Revenue Code;

(D) Could result in a loss in excess of a participant's or beneficiary's account balance, or

(E) Would result in a direct or indirect

(*1*) Sale, exchange, or lease of property between a plan sponsor or any affiliate of the sponsor and the plan except for the acquisition or disposition of any interest in a fund, subfund or portfolio managed by a plan sponsor or an affiliate of the sponsor, or the purchase or sale of any qualifying employer security (as defined in section 407(d)(5) of the Act) which meets the conditions of section 408(e) of ERISA and section (d)(2)(ii)(E)(*4*) below,

(*2*) Loan to a plan sponsor or any affiliate of the sponsor,

(*3*) Acquisition or sale of any employer real property (as defined in section 407(d)(2) of the Act), or

(*4*) Acquisition or sale of any employer security except to the extent that

(*i*) Such securities are qualifying employer securities (as defined in section 407(d)(5) of the Act);

(*ii*) Such securities are stock or an equity interest in a publicly traded partnership (as defined in section 7704(b) of the Internal Revenue Code of 1986), but only if such partnership is an existing partner-

ship as defined in section 10211(c)(2)(A) of the Revenue Act of 1987 (Public Law 100-203),

(*iii*) Such securities are publicly traded on a national exchange or other generally recognized market,

(*iv*) Such securities are traded with sufficient frequency and in sufficient volume to assure that participant and beneficiary directions to buy or sell the security may be acted upon promptly and efficiently,

(*v*) Information provided to shareholders of such securities is provided to participants and beneficiaries with accounts holding such securities,

(*vi*) Voting, tender and similar rights with respect to such securities are passed through to participants and beneficiaries with accounts holding such securities;

(*vii*) Information relating to the purchase, holding, and sale of securities, and the exercise of voting, tender and similar rights with respect to such securities by participants and beneficiaries, is maintained in accordance with procedures which are designed to safeguard the confidentiality of such information, except to the extent necessary to comply with Federal laws or state laws not preempted by the Act,

(*viii*) The plan designates a fiduciary who is responsible for ensuring that The procedures required under subparagraph (d)(2)(ii)(E)(*4*)(*vii*) are sufficient to safeguard the confidentiality of the information described in that subparagraph, such procedures are being followed, and the independent fiduciary required by subparagraph (d)(2)(ii)(E)(*4*)(*ix*) is appointed, and

(*ix*) An independent fiduciary is appointed to carry out activities relating to any situations which the fiduciary designated by the plan for purposes of subparagraph (d)(2)(ii)(E)(*4*)(*viii*) determines involve a potential for undue employer influence upon participants and beneficiaries with regard to the direct or indirect exercise of shareholder rights. For purposes of this subparagraph, a fiduciary is not independent if the fiduciary is affiliated with any sponsor of the plan

(iii) The individual investment decisions of an investment manager who is designated directly by a participant or beneficiary or who manages a look-through investment vehicle in which a participant or beneficiary has invested are not direct and necessary results of the designation of the investment manager or of investment in the look-through investment vehicle. However, this paragraph (d)(2)(iii) shall not be construed to result in liability under section 405 of ERISA with respect to a fiduciary (other than the investment manager) who would otherwise be relieved of liability by reason of section 404(c)(2) of the Act and paragraph (d) of this section.

(3) *Prohibited transactions.* The relief provided by section 404(c) of the Act and this section applies only to the provisions of part 4 of title I of the Act. Therefore, nothing in this section relieves a disqualified person from the taxes imposed by sections 4975(a) and (b) of the Internal Revenue Code with respect to the transactions prohibited by section 4975(c)(1) of the Code

(e) *Definitions* For purposes of this section:

(1) *Look-through investment vehicle* means:

(i) An investment company described in section 3(a) of the Investment Company Act of 1940, or a series investment company described in section 18(f) of the 1940 Act or any of the segregated portfolios of such company,

(ii) A common or collective trust fund or a pooled investment fund maintained by a bank or similar institution, a deposit in a bank or similar institution, or a fixed rate investment contract of a bank or similar institution,

(iii) A pooled separate account or a fixed rate investment contract of an insurance company qualified to do business in a State, or

(iv) Any entity whose assets include plan assets by reason of a plan's investment in the entity,

(2) *Adequate consideration* has the meaning given it in section 3(18) of the Act and in any regulations under this title;

(3) An *affiliate* of a person includes the following:

(i) Any person directly or indirectly controlling, controlled by, or under common control with the person,

(ii) Any officer, director, partner, employee, an employee of an affiliated employer, relative (as defined in section 3(15) of ERISA), brother, sister, or spouse of a brother or sister, of the person, and

(iii) Any corporation or partnership of which the person is an officer director or partner

For purposes of this paragraph (e)(3), the term "control" means, with respect to a person other than an individual, the power to exercise a controlling influence over the management or policies of such person

(4) A *designated investment alternative* is a specific investment identified by a plan fiduciary as an available investment alternative under the plan

(f) *Examples* The provisions of this section are illustrated by the following examples. Examples (5) through (11) assume that the participant has exercised independent control with respect to his individual account under an ERISA section 404(c) plan described in paragraph (b) and has not directed a transaction described in paragraph (d)(2)(ii).

(1) Plan A is an individual account plan described in section 3(34) of the Act The plan states that a plan participant or beneficiary may direct the plan administrator to invest any portion of his individual account in a particular diversified equity fund managed by an entity which is not affiliated with the plan sponsor, or any other asset administratively feasible for the plan to hold However, the plan provides that the plan administrator will not implement certain listed instructions for which plan fiduciaries would not be relieved of liability under section 404(c) (see paragraph (d)(2)(ii)). Plan participants and beneficiaries are permitted to give investment instructions during the first week of each month with respect to the equity fund and at any time with respect to other investments The plan provides for the pass-through of voting, tender and similar rights incidental to the holding in the account of a participant or beneficiary of an ownership interest in the equity fund or any other investment alternative available under the plan. The plan administrator of plan A provides each participant and beneficiary with the information described in subparagraphs (*i*), (*ii*), (*iii*), (*iv*), (*v*), (*vi*) and (*vii*) of paragraph (b)(2)(i)(B)(*1*) upon their entry into the plan, and provides updated information in the event of any material change in the information provided Immediately following an investment by a participant or beneficiary in the equity fund, the plan administrator provides a copy of the most recent prospec-

tus received from the fund to the investing participant or beneficiary Immediately following any investment by a participant or beneficiary in any other investment alternative which is subject to the Securities Act of 1933, the plan administrator provides the participant or beneficiary with the most recent prospectus received from that investment alternative (see paragraph (b)(2)(i)(B)(*1*)(*viii*)) Finally, subsequent to any investment by a participant or beneficiary, the plan administrator forwards to the investing participant or beneficiary any materials provided to the plan relating to the exercise of voting, tender or similar rights attendant to ownership of an interest in such investment (see paragraph (b)(2)(i)(B)(*1*)(*ix*)) Upon request, the plan administrator provides each participant or beneficiary with copies of any prospectuses, financial statements and reports, and any other materials relating to the investment alternatives available under the plan which are received by the plan (see paragraph (b)(2)(i)(B)(*2*)(*ii*)) Also upon request, the plan administrator provides each participant and beneficiary with the other information required by paragraph (b)(2)(i)(B)(*2*) with respect to the equity fund, which is a designated investment alternative, including information concerning the latest available value of the participant's or beneficiary's interest in the equity fund (see paragraph (b)(2)(i)(B)(*2*)(*v*)) Plan A meets the requirements of paragraphs (b)(2)(i)(B)(*1*) and (*2*) of this section regarding the provision of investment information

NOTE The regulation imposes no additional obligation on the administrator to furnish or make available materials relating to the companies in which the equity fund invests (e g , prospectuses, proxies, etc)

(2) Plan C is an individual account plan described in section 3(34) of the Act under which participants and beneficiaries may choose among three investment alternatives which otherwise meet the requirements of paragraph (b) of this section The plan permits investment instruction with respect to each investment alternative only

on the first 10 days of each calendar quarter, i e January 1-10, April 1-10, July 1-10 and October 1-10 Plan C satisfies the condition of paragraph (b)(2)(ii)(C)(*1*) that instruction be permitted not less frequently than once within any three month period, since there is not any three month period during which control could not be exercised

(3) Assume the same facts as in paragraph (f)(2), except that investment instruction may only be given on January 1, April 4, July 1 and October 1 Plan C is not an ERISA section 404(c) plan because it does not satisfy the condition of paragraph (b)(2)(ii)(C)(*1*) that instruction be permitted not less frequently than once within any three month period Under these facts, there is a three month period, e g , January 2 through April 1, during which control could not be exercised by participants and beneficiaries

(4) Plan D is an individual account plan described in section 3(34) of the Act under which participants and beneficiaries may choose among three diversified investment alternatives which constitute a broad range of investment alternatives The plan also permits investment instruction with respect to an employer securities alternative but provides that a participant or beneficiary can invest no more than 25% of his account balance in this alternative This restriction does not affect the availability of relief under section 404(c) inasmuch as it does not relate to the three diversified investment alternatives and, therefore, does not cause the plan to fail to provide an opportunity to choose from a broad range of investment alternatives

(5) A participant, P, independently exercises control over assets in his individual account plan by directing a plan fiduciary, F, to invest 100% of his account balance in a single stock P is not a fiduciary with respect to the plan by reason of his exercise of control and F will not be liable for any losses that necessarily result form P's investment instruction

(6) Assume the same facts as in paragraph (f)(5), except that P directs F to purchase the stock from B, who is a party in interest with respect to the plan Neither P nor F has engaged in a transaction prohibited under section 406 of the Act P because he is not a fiduciary with respect to the plan by reason of his exercise of control and F because he is not liable for any breach of part 4 of title I that is the direct and necessary consequence of P's exercise of control However, a prohibited transaction under section 4975(c) of the Internal Revenue Code may have occurred, and, in the absence of an exemption, tax liability may be imposed pursuant to sections 495 (a) and (b) of the Code

(7) Assume the same facts as in paragraph (f)(5), except that P does not specify that the stock be purchased from B, and F chooses to purchase the stock from B In the absence of an exemption, F has engaged in a prohibited transaction described in 406(a) of ERISA because the decision to purchase the stock from B is not a direct or necessary result of P's exercise of control

(8) Pursuant to the terms of the plan, plan fiduciary F designates three reputable investment managers whom participants may appoint to manage assets in their individual accounts Participant P selects M, one of the designated managers, to manage the assets in his account M prudently manages P's account for 6 months after which he incurs losses in managing the account through his imprudence M has engaged in a breach of fiduciary duty because M's imprudent management of P's account is not a direct or necessary result of P's exercise of control (the choice of M as manager) F has no fiduciary liability for M's imprudence because he has no affirmative duty to advise P (see paragraph (c)(4)) and because F is relieved of co-fiduciary liability by reason of section 404(c)(2) (see paragraph (d)(2)(ii)) F does have a duty to monitor M's performance to determine the suitability of continuing M as an investment manager, however, and M's imprudence would be a factor which F must consider in periodically reevaluating its decision to designate M

(9) Participant P instructs plan fiduciary F to appoint G as his investment manager pursuant to the terms of the plan which provide P total discretion in choosing an investment manager Through G's imprudence, G incurs losses in managing P's account G has engaged in a breach of fiduciary duty because G's imprudent management of P's account is not a direct or necessary result of P's exercise of control (the choice of G as manager) Plan fiduciary F has no fiduciary liability for G's imprudence because F has no obligation to advise P (see paragraph (c)(4)) and because F is relieved of co-fiduciary liability for G's actions by reason of section 404(c)(2) (see paragraph (d)(2)(ii)) In addition, F also has no duty to determine the suitability of G as an investment manager because the plan does not designate G as an investment manager

(10) Participant P directs a plan fiduciary, F, a bank, to invest all of the assets in his individual account in a collective trust fund managed by F that is designed to be invested solely in a diversified portfolio of common stocks Due to economic conditions, the value of the common stocks in the bank collective trust fund declines while the value of publicly-offered fixed income obligations remains relatively stable F is not liable for any losses incurred by P solely because his individual account was not diversified to include fixed income obligations Such losses are the direct result of P's exercise of control, moreover, under paragraph (c)(4) of this section F has no obligation to advise P regarding his investment decisions

(11) Assume the same facts as in paragraph (f)(10) except that F, in managing the collective trust fund, invests the assets of the fund solely in a few highly speculative stocks F is liable for losses resulting from its imprudent investment in the speculative stocks and for its failure to diversify the assets of the account This conduct involves a separate breach of F's fiduciary duty that is not a direct or necessary result of P's exercise of control (see paragraph (d)(2)(ii))

(g) *Effective date* – (1) *In general.* Except as provided in paragraph (g)(2), this section is effective with respect to transactions occurring on or after the first day of the second plan year beginning on or after October 13, 1992

(2) This section is effective with respect to transactions occurring under a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before October 13, 1992 after the later of the date determined under paragraph (g)(1) or the date on which the last collective bargaining agreement terminates For purposes of this paragraph (g)(2), any extension or renegotiation of a collective bargaining agreement which is ratified on or after October 13, 1992 is to be disregarded in determining the date on which the agreement terminates

(3) Transactions occurring before the date determined under subparagraph (g)(1) or (2) of this section, as applicable, are governed by section 404(c) of the Act without regard to the regulation

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K SUTER
Clerk of the Court
(202) 479-3011

September 14, 2009

Mr David C. Frederick
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P L.L.C
1615 M Street, N W
Suite 400
Washington, DC 20036

Re Dennis Hecker, et al.
v Deere & Company, et al
Application No. 09A249

Dear Mr Frederick

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on September 14, 2009 extended the time to and including October 14, 2009

This letter has been sent to those designated on the attached notification list

Sincerely,

William K. Suter, Clerk
by /s/ CLAYTON HIGGINS

Clayton Higgins
Case Analyst

[attached notification list omitted]